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THE ARGUMENTS OF THE LORD-KEEPER, THE TWO Lords Chief Justices, AND Mr. Baron Powell, When They Gave JUDGMENT FOR THE Earl of BATH.

Die Martis 12 *Decemb.* 1693.

In the Middle-Temple Hall,

Com. Bathon. adv. Com. Mountague, at al.

THIS Day being appointed by the Lord Keeper to hear the Opinions of the two Chief Juſtices and Mr. Baron *Powell*, who aſſiſted at the hearing of this Cauſe, and to deliver his Lordſhip's own Judgment therein, Mr. Attorney General moved on the Behalf of the Earl of *Mountague*, &c. for the Judgment of the Court; and Mr. Baron *Powell* delivered his Opinion firſt.

Mr. Baron Powell. The Queſtion in this Caſe is, Whether there be any Ground in Equity, to ſet aſide a Deed of Releaſe, made in *July*, 1681. for the Settlement of the late Duke of *Albemarle*'s Eſtate, by which my Lord of *Bath* claims. The Validity of this Deed hath been tried at Law upon an Ejectment in the Court of *Kings-Bench*, by Direction of this Court, where the Title has been found for the Earl of *Bath*, by the Strength of this Deed; ſo that it muſt be agreed, my Lord of *Bath* hath a good Title at Law, becauſe the Verdict hath found it ſo, and all Parties concerned have hitherto acquieſced under this Verdict.

This Caſe comes now back upon the Equity reſerved, and it is only now to be conſidered, what Matters of Equity have been offered to avoid this Title thus found at Law. And thoſe I think may be reduced to five Heads.

Firſt; That this Deed was obtained by Surprize and Circumvention.

Secondly; That it was a concealed and a forgotten Deed.

Thirdly; That this is a Deed attendant upon a Will, and ſo revocable in its own Nature, although it had no Power of Revocation in it.

Fourthly; That there is an implied Truſt in this Deed, that the Duke might have charged the Eſtate to the full Value, and conſequently might well diſpoſe of it in Equity. And,

Fifthly; That the great Solemnity and Deliberation uſed about making the laſt Will, and the publiſhing that Will, do amount to a Revocation in Equity, notwithſtanding that the Circumſtances of the Power are not ſtrictly purſued.

I am of Opinion in this Caſe, that this Deed having been affirmed by a Verdict upon a Solemn Trial at the Bar at Law, none of theſe Matters are ſufficient for to ground a Decree in a Court of Equity, to ſet aſide this Deed; and I ſhall give you my Reaſons for this Opinion in the ſame Order I mentioned thoſe Heads in, with particular Anſwers to the particular Objections under each Head.

1. It is ſaid, this is a Deed that was obtained by Surprize and Circumvention. Now I perceive this word *Surprize* is of a very large and general Extent. They ſay, if the Deed be not read to or by the Party, that is a Surprize: Nay the Miſtake of a Counſel, that draws the Deed either in Miſrecitals or other things, that is a Surprize of the Counſel, and the Sur-

prize of the Counſel muſt be interpreted the Surprize of the Client. Theſe things have been urged in this Caſe, and I thought fit to mention them for the introducing my Reaſon againſt this Head of Argument; and it is this:

That if theſe things be ſufficient to let in a Court of Equity to ſet aſide Deeds found by Verdict to be good in Law, then no Man's Property can be ſafe: I hardly know any Surprize that ſhould be ſufficient to ſet aſide a Deed after a Verdict, unleſs it be mixed with Fraud, and that expreſly proved; and I know not of any ſuch proved in this Caſe.

It is true, Duke *George* by his Will, and the Settlement made upon his Son at his Marriage, takes no notice of, or makes any Proviſion for the Earl of *Bath*; but that, I take it, is not to be regarded as any way material at all, becauſe he takes no notice, in either of them, of any Body elſe but him that was his Heir. But I muſt obſerve here by the way, that there was not only a very near Relation between Duke *George* and the Earl of *Bath*, but a very intimate Friendſhip cultivated by mutual Offices of Kindneſs between them to his Death. And I muſt mention one Particular, becauſe to me it ſeems a clear Anſwer to this Objection, that is, His making no Proviſion for the Earl in the Will or Settlement, might be the Occaſion why Duke *George* did make ſuch an earneſt Application to King *Charles* the Second, that upon Failure of his Iſſue Male, his Majeſty would pleaſe to beſtow the Dukedom upon the Earl, and annex *Theobalds* to it, which would then revert to the Crown. And that King did often promiſe he would, and afterwards did it ſolemnly under the Sign Manual.

But then it is ſaid, that after this Duke *Chriſtopher* made his Will, and therein there is no notice taken of any ſuch Diſpoſition of his Eſtate to the Earl of *Bath*; but that is not, I think, to be regarded neither, becauſe that was a Will only of his Perſonal Eſtate, and made when he was under Age, and could not diſpoſe of his Real Eſtate.

Then come we to the Year 1675. when the Will was made, to which this Deed has ſome Relation, and by that Will Duke *Chriſtopher* doth ſettle a great Part of his Eſtate, upon Failure of Iſſue of his own Body, upon my Lord of *Bath*. There is no Pretence of any Surprize upon the Duke when he made this Will, and it is plain then he had an Intention that my Lord of *Bath* ſhould have a great Share in his Eſtate if he died without Iſſue.

Now then it is to be conſidered what there is of Proof in this Caſe of any thing that might be a Ground to conceive why he ſhould alter this Intention between the Years of 1675 and 1681, when this Deed was made. There is no Proof of any Miſunderſtanding between the Duke and the Earl in that Interval; but on the contrary, that there was a continual Friendſhip and Intercourſe of Kindneſs between them all the while, as doth appear by a continual Succeſſion of Letters and other Correſpondences paſſing between them in thoſe Years, one of which I cannot chuſe but take notice of, becauſe of the Date of it, to wit, in *June* 1681. upon my Lord *Lanſdown*'s Intention to travel; wherein the Duke takes notice of the Intereſt he had in my Lord of *Bath*'s Family, and particularly in his eldeſt Son, as the greateſt next to that of the Earl himſelf: And I ſay, I mention this Letter, becauſe of the Date, that it is ſo near the very Date of the Deed, that it is poſſible the Date was then made, becauſe it was within a Month after that Letter ſealed and executed, therefore it might well be referr'd to in it.

Next, this appears to be a Deed drawn by the Duke of *Albemarle*'s own Counſel, Sir *Thomas Stringer*; for it is proved the Paper-Draught is all of his Son's Hand-writing, except the firſt and laſt Sheet, and all of it interlined

lined with Sir *Thomas* his own Hand: *Errington* has proved the Abſtract all of Sir *Thomas* his Hand, with the very date in it, and ſwears that Sir *Thomas* examined it with him. Now is it to be imagined that Sir *Thomas Stringer* ſhould prepare ſuch a Settlement for the Duke to execute without any Order or Inſtructions from him about it? No certainly that cannot be thought. But they ſay Sir *Thomas Stringer* if he did draw it, might forget it or overlook it, and he now denies any Knowledg of it. Truly, I cannot value much what Sir *Thomas Stringer* has ſworn in this Cauſe, he is not conſiſtent with himſelf, and makes but a very odd Figure in the Cauſe.

Mr. *Stringer*. My Lord, I beg your pardon for interrupting Mr. Baron *Powell*, but I muſt vindicate my Father; he never ſwore a word in this Cauſe.

Lord-Keeper. No he did not, he was dead before the Cauſe came into the Court. That was a Miſtake.

Mr. Baron *Powell*. I am ſure there was Oath of what he had ſaid about this Deed.

Mr. *Stringer*. That, my Lord, you may make what you pleaſe of, but he never made any Oath in the Cauſe.

Mr. Baron *Powell*. But that which I mention him for, was, that there is Proof apparent that he was adviſed with about this Deed, and he was the Duke's conſtant Counſel. I do not think I confeſs that Sir *William Jones* did draw this Deed; it is not inſiſted upon by the Counſel of my Lord of *Bath* that he did; and any one that conſiders the Frame of it will think as I do. But I conceive he was adviſed with upon the *Proviſo*, and the Writing in the Margent againſt the *Proviſo*; I approve of this *Proviſo*, I believe to be his Hand. Though ſeveral Perſons of good Credit that were well acquainted with his Hand, have ſworn they believe it not to be his Hand. But they might be miſtaken, and to me it appears by the Compariſon of the Records, Deeds and Papers in open Court; for it is plain, according to the various Nature of the ſeveral Things he writ, or ſet his Hand to, he did write ſeveral Hands, and particularly wrote his Name ſometimes one way and ſometimes another. And therefore upon Compariſon of that with other Papers, I do believe it to be his Hand.

The next Thing I would mention, is this; Here are ſix ſubſcribing Witneſſes to the ſealing and executing of this Deed at *Albemarle*-Houſe, of which Sir *William Jones* was one: And one *Aleman*, that is one of the Witneſſes, ſwears, That when the Duke delivered the Deed to the Earl of *Bath*, he wiſhed he could have done more for him. It was probable then the Duke believed he had done ſomething for him; and it is very probable too, he knew what he had done for him, when he wiſhed he was able to have done more. And Mr. *Prideaux* ſwears (though he does not exactly fix the time) that the Duke told him himſelf he had ſettled his Eſtate upon the Earl of *Bath*. Then, I ſay, it is hard to believe the Duke was ſurprized in making this Deed, when his own conſtant Counſel drew it, ſo able a Counſel peruſed and approved ſo main a part of it, and was preſent at the Execution of it, and he ſhould expreſs his Wiſhes to be able to do more, can he be ſuppoſed not to know what he did?

But now let us examine the Evidence, and Objections on the other ſide: They ſay it doth not appear that this Deed was ever read to the Duke, or by him. It is indeed proved the laſt Will was read to him, by my Lord Chief-Juſtice *Pollexfen*, but not at the time of the Executing of it. But however, I think the not reading of a Deed to, or by the Party that

executes it, is a very ſlender Objection to make out a Surprize, ſo as to ſet it aſide. That would ſhake many a Conveyance, I doubt it would ſhake many Deeds that were made and executed by the Duke. For though he was ſo cautious as ſome of their Witneſſes ſay, that he would not execute any Deeds, but what his Counſel ſet their Hands to, yet I do not find that any of them uſed to be read to him, or he himſelf read them at the time he ſealed them. Therefore it is a dangerous Doctrine to ſet aſide a Deed upon ſuch an Account. Some People will not have Leiſure to hear Deeds read, or read them themſelves.

Then they object the Miſtakes and Miſ-recitals of the Limitations of the Will in the Deed, which refers to the Will, as particularly that of *Norton Diſney*, and ſome others of leſs moment: But God forbid that the Miſtake of a Counſel in a Recital in a Deed, ſhould be of that great moment as to ſet aſide the Deed when executed by the Party.

But there is another Matter much inſiſted on by them as an Argument of Surprize: that is, This Deed is pretended to be made in Confirmation of the Will in 75, and yet it varieth from that Will in almoſt all the Limitations of the Eſtates, except in ſome part of that to my Lord of *Bath*. I confeſs I have look'd over the Variations, and there are ſeveral, but I have this in general to ſay to it, that I take it this Deed was made for the ſake of the Earl of *Bath*; and that it was for the Earl's better Security, that he bound himſelf up by ſo ſtrict a *Proviſo* not to revoke. And if you look into the Deed, it will be found to confirm the Will as to my Lord of *Bath*, which was the main Point of both Deed and Will. For it ſets the Eſtate given to him upon a firmer foot than it was by the Will, which was revocable in its Nature: Therefore it muſt be intended, as no doubt it was, for that very Purpoſe to ſecure it more to my Lord of *Bath*, than it was by the Will.

But that which is ſaid to be an Argument of the greateſt weight and moment in this Matter, that there muſt be Surprize in the Caſe, is this: It is hardly to be believed, and almoſt impoſſible, that the Duke ſhould ſend for Mr. *Monk* out of *Holland*, by his Will deſire the King to beſtow upon him the Barony of *Potheridg*, the ancient Seat of the Family, make a Diſpoſition of his Eſtate by a Will ſo ſolemnly prepared and deliberated upon, take care to have three parts of it; one whereof was to be tranſmitted to the Dutcheſs of *Newcaſtle*, another part delivered by himſelf to Mr. *Monk*, and the third part taken with him to *Jamaica*, and there pulled out and declared to be his Will, and yet intend no real Diſpoſition of his Eſtate by all this. Theſe are things ſo diſhonourable to the Duke, that they are not eaſily to be believed of a Man of his Honour and Quality.

I confeſs, this is an Objection of great weight, and carrieth much Preſumption with it, but it is Preſumption only, which how far it ſhall conclude againſt a Verdict, is left to Conſideration. But beſides, I would put the Caſe upon a like bottom of Preſumption the other way, and then ſee what we ſhall make of it. Duke *George* prevails with King *Charles* II. to promiſe to make the Earl of *Bath*, Duke of *Albemarle* upon his failure of Iſſue-Male; Duke *Chriſtopher*, when he comes of Age doth make a Settlement of his Eſtate upon the Earl of *Bath*, upon failure of Iſſue of his Body. The Earl of *Bath* is a Perſon that doth heap Obligations upon both Dukes and their Family; is Aſſiſtant to the Duke, both in the Purchaſe and Sale of *Albemarle-Houſe*, is continually the Chief Perſon concerned in all his Affairs, nothing almoſt is done without him. There is no proof of

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any Miſunderſtanding, or Ground for any, between them. Nay, it was the Report in the Family, That if the Duke died without Iſſue, the Earl of *Bath* was to have the Eſtate: He and Sir *Walter Clarges* are the Duke's neareſt Relations; whereas Mr. *Monk*, that I find, is not in the Caſe proved to be at all of Kin to him, and ſo we muſt not take him to be related without proof; but only that the Duke called him Couſin.

Now after all this, that the Duke ſhould make this laſt Will, and give all this Eſtate to a Stranger (for ſo as to any thing appears in proof) and give nothing to the Earl of *Bath*, when by the former Settlement he had given him ſuch hopes of ſo great a Share; this, I think, is a very Unaccountable thing; and, I confeſs, I know not how to extricate my ſelf out of the Confuſion it cauſeth in me: But I muſt ſet the one againſt the other as to that Objection, and leave the Matter in the dark as to the Duke's Honour, as I found it; though, I think, I may give a further Anſwer to this Objection under the Second Head.

But I muſt ſpeak ſomething more under this, for I would omit nothing that I conceive to be material in the Caſe. There is another thing objected that ſeems dark in this Caſe, and that is, What was the meaning of ſome Parchments that were ingroſſed by *Thompſon*, the Summer before the Duke went to *Jamaica*? The Jury have found that this Deed was executed in 81. And if then the other Side would make uſe of this, as inſinuating that they were the ſame Deeds, then that is not to be admitted, as being expreſly againſt the Verdict. But to me it ſeems, That theſe Deeds in 87. were made upon ſome deſign to have them executed then, perhaps to ſettle the Eſtate upon a firmer foot than it was thought before. The Earl of *Bath* perhaps might be Jealous that the Dutcheſs might prevail upon the Duke to revoke the former Deed in due form; and therefore theſe Deeds might be prepared abſolutely without any power of Revocation, and thought he might procure the Duke to ſeal them ſo before he went to *Jamaica*; I ſay, that might be the Intention, though what was the Deſign, I cannot really tell.

But admitting that ſuch Writings were prepared with ſuch a deſign to get the Duke to execute them, I know not that all this put together, will be a ſufficient Ground in Equity to ſet aſide the Deed of 81. For all Deſigns in gaining of Deeds, will not avoid Deeds actually made: And that is plain, from the Caſe of *Bodmin* and *Roberts*, that was one of the Precedents uſed in this Caſe, which was in ſhort thus:

Mr. *Roberts*, Son to the late Earl of *Radnor*, married the only Daughter and Child of *Bodmin*, who was ſo paſſionately fond of his Daughter, that whenever ſhe was in his preſence, he would break out into great Fits of Paſſion, and weep for Joy to ſee her. Notwithſtanding this great fondneſs of his Daughter, one Mr. *Wynne* took an Opportunity when Mr. *Bodmin* was under an Arreſt, and officiouſly came to Bail him, and inſinuates into him, that his Son-in-Law was the occaſion of his being Arreſted; and thereupon wrought ſo far upon him as to get him into a private place, where he was removed out of his Son and Daughters Knowledge, and where he went by a ſtrange Name: No one of his Friends had any acceſs to him but *Wynne* himſelf, and ſuch as he would permit. Mr. *Roberts* made frequent Application to be admitted to him, but was refuſed, which was all in proof. While he was under this Concealment, *Wynne* tampers with one *Barry* that had Mr. *Bodmin*'s Will in his Cuſtody, and would have had him ſuppreſſed that Will, whereby he gave his Eſtate to his Daughter. It

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happens during his being thus ſecured he falls ſick, then there is a Will prepared for him to give this Eſtate away to *Wynne* from his only Daughter; they get three Witneſſes to the Execution of it. This Will was never read over to him; this appears in the proof, but they get him to execute it: And he dies. Hereupon Mr. *Roberts* exhibits his Bill in this Court to ſet aſide this Will. There was proof made of all this Matter that I have opened, and this Point, of Surprize in obtaining this Will, was inſiſted upon ſtrongly. The Lord Chancellor at the Hearing of the Cauſe, was aſſiſted by the Chief Juſtice *Bridgman*, the Chief Baron *Hales*, and Juſtice *Rainsford*. But notwithſtanding all this proof, they could not prevail to ſet aſide this Will in this Court; and afterwards when they came into the Houſe of Lords, they were of the ſame Opinion, and it ended at laſt in Relief by the Legiſlative Power, an Act of Parliament.

This now I take to be much ſtronger for Relief, if any could be, than the Caſe now in Queſtion; and if then upon ſuch apparent Surprize and Practice it could not be ſet aſide in Equity, ſure this cannot, where there doth appear no proof at all of any ſuch thing.

I come then to conſider the Second Head of Argument againſt this Deed, that it was a concealed and forgotten Deed. Now that it was concealed from the Dutcheſs, and thoſe that were thought her Agents, I agree it ſo; and it is plain, it was always intended it ſhould be ſo. But that it was concealed from the Duke, I think has no Ground at all. The thing they would infer it from, is the Evidence of *Aleman*, whoſe Teſtimony was read once and again; and he ſays, This Deed at the time of the Execution of it, was delivered to the Earl of *Bath*, whence they infer he carried it away, and kept it concealed from the Duke who forgot it: But upon reviewing *Aleman*'s Depoſition, it can be underſtood to mean no other, but only delivered to that effect as a Deed to his Uſe; but not that it was delivered to him for Cuſtody, and carried away by him.

No truly, it ſeems plain to me from all the Proofs and Circumſtances of the Caſe, That this Deed did remain in the Cuſtody of the Duke of *Albemarle*; For that Sir *Thomas Stringer*, a little before the Duke went into *Jamaica*, doth draw an Abſtract of it, in which the very date is mentioned; which could not be drawn from the Paper-draught where the date is in Blank, but muſt be from the Deed it ſelf: And how ſhould he have the Deed to do it by, unleſs it was in the Duke's Cuſtody?

Beſides, there is a ſtrong proof, That the Will of 75 was in the Earl's Cuſtody once; for the Duke ſent to him into the Country for it, and the Earl brought it up with him; for it is plain by the wording and framing of the laſt Will in 87, my Lord Chief Juſtice *Pollexfen* had it in his Cuſtody for comparing the one with the other; they run ſo in the ſame manner, that it is impoſſible but he that drew the laſt, muſt have the firſt by him at the ſame time.

How then came this Deed of 1681, and this Will of 1675, into the Cuſtody of the Earl of *Bath*, under the ſame Cover with the Seal of the Duke of *Albemarle*'s Coat of Arms on it? for ſo it was produced firſt by the Earl of *Bath*, after the notice of the Duke's Death in *Jamaica*. This cannot be imagined how it could be any otherwiſe, than as the Earl of *Bath* ſays in his Anſwer, that they were delivered ſo to him by the Duke a little before his going beyond Sea; or elſe that the Earl of *Bath* found them ſo ſealed up and covered among the Duke's Writings. And either way it is a mighty ſtrong Proof, that the Deed was all along till he went to *Jamaica* in his own Cuſtody, and not in the Earl of *Bath*'s.

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But however, it is further objected, That it was a forgotten Deed. Methinks what I last urged is a very good Proof it was not forgotten: but there is yet further Proof of it. Not long before he went abroad, the Duke had some Discourse with Mrs. *Crofts*, who (as she swears) was told by him, that she should have a good Neighbour at *New-hall* if he should miscarry beyond Sea, to wit, my Lord of *Bath*. And *Lane*, that is one of the Duke's Servants, doth swear, that the Duke told him, That after his Death the Earl of *Bath* would have *New-hall*. Mr. *Crofts* swears, That upon his Application to know who he should address to in case of his Grace's Death, the Duke told him, all he could do for him, was to recommend him to the Earl of *Bath*, and Sir *Walter Clarges*, and ordered him to leave the Keys of his Writings with the Earl of *Bath*; for he was most concerned in them in case he should do otherwise than well.

It is proved that the usual Discourse of the Family was, that the Earl of *Bath* would have the Estate after the Duke's Death, which must happen from some Expressions of the Duke to that purpose. And Sir *Walter Clarges* doth in his Answer swear, That the Duke told him, he had provided for him as the Earl of *Bath* knew, which could be only by this Deed. And Mr. *Greenville* swears in his Answer much to the same purpose. And Mr. *Courtney* swears, That eight or nine Years ago, my Lord of *Bath* came to him with a Draught of a Settlement to the same effect to advise upon: And about three Months before the Duke went to *Jamaica*, he came again with a Copy of this Settlement to advise, whether a Will would revoke it; and that he gave his Opinion it would not, if the Circumstances of the Power were not pursued.

But now here the Objection recurs again; Is it possible to be believed that the Duke should deliberately make so solemn a Will, take six Months time in the drawing and publishing of it, and then execute it in the Presence of three Witnesses, if he had not forgot this Deed, but had known all along that there was such an one? If he did know it, and had acquainted the Counsel that drew his Will with it, certainly he would have advised him, that unless he did revoke it, according to the Circumstances of the Power, all this Care and Solemnity would signify nothing.

Truly on the other side it is to be considered, Whether the six Months was taken up in Deliberation and solemn Preparation for making of that Will; or, whether that was not an Evidence of a Difficulty to prevail upon the Duke to do it at all: For I must take the liberty to say, there are Proofs in the Case of Importunities used to bring him to it. Dr. *Benwick* did tell the Duke, unless he did it, the Dutchess would have a Return of her Distemper, and be very bad again. It is proved, that when Money is to be paid for the Counsels Fees, upon drawing it the Duke was uneasy, and said, the Dutchess might pay it if she would, for it was her Business. There appears great Difficulty afterwards to get him to execute it, that Sir *Thomas Stringer* importuned him much to it; upon which he grew very much in favour with the Dutchess, and there was Enquiry made for a Baronet's Patent to be got for him: all to engage him the more to get this Work done; and when it is done, how doth he bring it about? The Duke was that Day to go by appointment to Sir *Robert Clayton*'s to meet with my Lord *Jefferies*, and seal the Deeds of Purchase of *Dalby* and *Broughton*. Sir *Thomas* takes this Will in three parts, and three Witnesses along with him to Sir *Robert*'s; and after my Lord *Jefferies* were gone, and the Duke in a fretting discontented Humour, he gets him into a private Room in that House,

and then tells him he had brought his Will to him to ſeal; and the Duke, as Mr. *Crofts* ſwears, was unwilling to do it then, and would have put him off, but he preſt the Duke very hard to do it then, and told him he muſt do it, for he was to be gone the Northern Circuit the next day, and could not be at the Execution of it; upon which he did it, but not till after much urging and ſolicitation.

Now I would argue hence, Why ſhould the Duke of *Albemarle* be uneaſy and diſturbed at his being importuned to execute this Will, after ſo much Pains and ſo much Time in the drawing and preparing it? I cannot imagine any reaſon why, but that he had not forgotten this Deed, which he never intended to alter, and yet muſt do ſomething to ſatisfy ſome body's Importunity. He knew he ſhould in doing it, do a thing that would look very odly one day, and that made him ſo uneaſy, tho at laſt he did comply and did it.

But admit this Deed had been at that time forgotten by him, or concealed from him, Would this in a Court of Equity be a ſufficient Ground to ſet it aſide? I confeſs of a Purchaſer where one that claims by ſuch a Deed, will ſtand by, and permit the Purchaſe to go on and conceal the Deed; as to that Purchaſe the Deed will be a fraudulent Deed; but there is nothing of that in this Caſe, neither ſuch a Purchaſe, nor ſuch a Concealment: And therefore it can ſignify nothing here to ſet aſide this Deed, tho concealed and forgotten.

But now I come to a third Head of Objections; That this Deed is a Deed attendant upon the Will of 1675, and ſo revocable in its one nature, as a Will would be, altho it contained in it no Power of Revocation. This was very warmly inſiſted upon by the Counſel of Mr. *Monk*.

I confeſs there is ſuch a thing as a revocable Deed attendant upon a Will which is revocable; that is, where a Man doth ſuffer a common Recovery, and makes a Deed ſubject to his laſt Will and Teſtament; ſuch or ſuch an Uſe may be declared by Indenture under Hand and Seal as intended at that time of the Recovery. But this Indenture after it hath declared that Uſe being founded upon an Aſſurance that was always ſubject to Uſes declared in his laſt Will, that Will being always changeable, the Deed may be always changeable: And ſo is the Caſe in *Dyer* 314. 6. And the Reaſon is given in my Lord of *Ormond*'s Caſe in *Hobart* 349. by the Opinion of two Judges againſt one, becauſe the Foundation, which is his laſt Will, is always revocable. But ſuch an Indenture to declare Uſes is revocable; but a Feofment, or a Leaſe, and Releaſe to Uſes referring to a Will, or made to confirm a Will, that that ſhould be revocable, there is no Colour nor any Authority of Law for it.

The fourth Head is, That there is an implied Truſt, that the Duke might charge this Eſtate to the full Value; therefore in Equity he might diſpoſe of the Land. This Objection doth ariſe upon a variance ſuppoſed between the ingroſſed Deed and the Paper-draught: For it ſhould ſeem that one of the Sheets in the Paper-draught is cut juſt where this Truſt is declared, and ſo they would preſume it a general Truſt, which would ſubject the whole Eſtate to the Duke's diſpoſal,

But as to this Matter, it is ſworn by *Thompſon*, who ingroſſed the Deed, that he ingroſſed it by the Paper not cut, and did ingroſs it truly according to the Draught, and he was believed by the Jury ſo to have done: Therefore, I ſuppoſe it was cut ſince; and if it were, the Queſtion is by whom it was cut? Truly, I think it not worth the trouble of enquiring after that,

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but it is moſt probable it was not cut by thoſe to whoſe diſadvantage it would turn to cut it.

But here doth ariſe a conſiderable Objection. By the Will of 75, there are 20000 *l.* Legacies given, and here is a Truſt that doth ſubject this Eſtate to the Legacies of that Will of 1675, is revoked by the Will of 1687. Shall then the Earl of *Bath* hold this Eſtate free and diſcharged of any Legacies by the laſt Will?

I muſt confeſs this was objected on one ſide, but not debated on the other ſide; becauſe they that were of Counſel for the Earl of *Bath*, thought it did not concern this Queſtion now in debate. That they ſaid might be a Queſtion another Time between my Lord of *Bath*, and any Perſons that may come here to have any Legacies given them by the Will of 1687, if the Perſonal Eſtate will not anſwer, I cannot ſay poſitively but they may be payable out of this Truſt, though I give no Opinion in the Matter, it not having been debated, and ſo I have not conſidered it.

But ſure the conſequence of that, if it ſhould be ſo, would not be what this Head of Arguments I am upon would infer: That if the Duke might charge the Eſtate with Legacies, therefore he might diſpoſe of it, for he hath bound up himſelf by this Proviſo not to diſpoſe of it but under ſuch and ſuch Terms.

And that brings me to the laſt Head; Whether this Will of the Duke of *Albemarle*, made in 1687, and ſo ſolemnly done, be a Revocation in Equity, though it do not ſtrictly purſue the Circumſtances of the Power.

I know not any Rule more clear in our Law-Books than this, that all the Circumſtances preſcribed and required in a Power of Revocation muſt be obſerved to make it a good and effectual Revocation. So is *Scroops* Caſe; ſo is the Caſe of *Kibbett* and *Lee*. There is indeed a favourable Judgment to be given in expounding Powers, but both thoſe Caſes ſtill agree that all the Circumſtances muſt be ſtrictly obſerved.

It may be ſaid then, they muſt be obſerved in Law, but in a Court of Equity it makes another Caſe. For when a Man hath a Power over an Eſtate, thoſe Circumſtances are only a Guard upon himſelf that he may not be ſurprized into a ſudden diſpoſition of it: But when deliberately and ſolemnly he hath done an Act whereby he diſpoſeth of this Eſtate, but there wants ſome little Ceremony or Circumſtance, ſuch as the not tendring 12 *d.* or the like, a Court of Equity ought to ſupply ſuch a Defect to ſupport his ſolemn Intention to diſpoſe of it. For plain it is, he is not ſurprized into this Act, and ſo the Reaſon for thoſe Circumſtances does fail, and they need not be ſtrictly obſerved.

This way of Arguing may ſeem ſpecious in a Court of Equity I confeſs, but really I think I am able to give a very plain Anſwer to it, and that from the Nature of Powers of Revocation. It is certain no Conveyance at the Common Law could have a Power of Revocation annexed to it. As a Feoffment and Livery of Seiſin; and that becauſe the Law would not admit ſuch an Abſurdity that a Man ſhould give an Eſtate abſolutely to another, but yet reſerve a Power to recal it from him at his Pleaſure. It is ſuch a repugnancy as the Common Law will not permit. But a Man might have done this at Common Law, he might have annex'd a Condition to his Feoffment, that if he tendred 12 *d.* to the Feoffee or his Heirs, he might enter upon the Eſtate: ſo that the Eſtate which was Deveſted out of him by the Livery of Seiſin, might have been reveſted by a performance of the Condition and Reentry. So it ſtood at Common-Law.

But after the 27*th* of *H.* 8. for transferring Uſes into Poſſeſſion, Uſes became more pliable than Conveyances at Common-Law, wherein this Matter, and then Powers of Revocation firſt came in uſe and faſhion. Not but that

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it is as repugnant to a Conveyance after the Statute, as it was before; for certainly it is repugnant to give an Eſtate away, and yet have a general Power over that Eſtate. But a Power of Revocation was let in as a Condition, and would work as a Condition; but whereas the performance of a Condition at Common Law, would not work a reveſting of the Eſtate, without a Reentry; now the performance or execution of the Power doth transfer the Eſtate to the new Uſes, or reveſt the Eſtate in him that had the Power without any Reentry. But ſtill there is now a neceſſity of the Powers being performed, as there was of the Conditions being performed at Common-Law; for it is in the nature of a Condition and no more. So is *Inglefield*'s Caſe, 7 *Co.* 39.

There was a voluntary Conveyance made with a Power of Revocation; and he who had the Power is attainted of Treaſon. Now all Conditions forfeited to the Crown muſt be performed, or no Advantage can be taken. This Power was in this Caſe agreed to be forfeited to the Crown; the great Difficulty was, Whether the King could perform the Condition, or whether the Performance was not tied ſtrictly to the Perſon that had the Power veſted in him? That was the great Doubt in that Caſe, but there was no queſtion but it was a Condition, and the King ſhould have it as a Condition forfeited.

And it is likewiſe agreed in *Co. Lit.* 237. That it is a Condition, and would have been repugnant to be a general Power. So that it is not, as they ſay, a Guard only upon a Man's Self to prevent Surprize, but a Condition. And as a Man muſt perform a Condition at Common-Law to entitle him to Reenter, ſo he muſt execute his Power, to intitle him to a Revocation. And a Court of Equity can no more let a Man in to defeat an Eſtate upon a Power of Revocation, without a due execution of the Power, than the Common-Law could let a Man in to defeat an Eſtate upon a Condition, without performance of the Condition; or than a Court of Equity can think to let a Man in to defeat a voluntary Conveyance, without a Power of Revocation: for it is all but a Condition which muſt be performed, or no Advantage taken of it; and a Court of Equity may do great things, but they cannot alter things, or make them to operate contrary to their eſſential Natures and Properties.

I confeſs, where there is an Impediment of executing a Power of Revocation, or diſability of doing it, a Court of Equity may perhaps interpoſe. And therefore ſuppoſe the Earl of *Bath* had always had this Deed in his Cuſtody from the time of executing of it, and the Duke having a Mind to revoke it, had ſent to the Earl for it; that though ſeeing the Circumſtances required he might truly purſue them, but the Earl had refuſed to deliver it, and the Duke not knowing what the Power was, had done ſuch an Act with a mind to revoke; I agree it is reaſonable, that a Court of Equity ſhould interpoſe to ſupport it. But why is that? becauſe the Earl who was to have the benefit by this Deed, was the Impediment why it was not ſtrictly purſued.

And that is a Reaſon which would prevail at Common-Law. I will put you a Caſe to prove it, *Dyer*, 354. *A* makes a Feoffment to *B*, with a Power of Revocation; if *A* at any time during his Life pay or cauſe to be tendred to *B* at the Font-Stone in the Cathedral at *Sarum* 20 *l.* *A* tenders the 20 *l.* at the Place in the abſence of *B*, and without any notice to him to attend: this is held to be no Revocation. But ſaith the Book (as it ſhould ſeem) if he had ſent to *B* to be there, or ſome for him to receive the Money at the tender, and *B* would neither have come nor ſent, it had been a good Revocation. So that where there is an Impediment by the Default of the Party who is to have Advantage by the non-performance of the Power; and he that hath the Power do an Act that expreſſeth his meaning to revoke, that ſhall be a good Revocation at Law, and in Equity.

I agree likewiſe, that in caſe of Diſability a Court of Equity may interpoſe; And I agree therefore, that in caſe the Duke of *Albemarle* had taken this Deed over with him to *Jamaica*, and there had had an Intention to revoke it, and had gone as far as he could to do it, had made his Will, and had ſix Witneſſes to it, I believe it would be a good Revocation in Equity, though none of the Witneſſes were Peers, becauſe of the diſability he would be under to have any ſuch Witneſſes.

And ſo that defective Executions of Powers of Revocations may be helped in Courts of Equity, in the Caſes of Purchaſers and Creditors, I take it to be true too. And it is ſaid other particular Caſes there may be, wherein a Court of Equity can relieve, though the Revocation be not according to the Power reſerved. And as to that, I confeſs, ſeveral Precedents have been cited, and I wonder, conſidering the Nature of them, that more have not been mentioned, but I think there are not above four or five very much to the purpoſe, and thoſe I ſhall take notice of, and trouble you with no more.

The firſt is the Caſe of *Thorn* and *Newman*; and that Caſe is no more in ſhort than this. *A* Covenants with *B* to ſtand ſeized to Uſes with a Power of Revocation upon the tender of 12 *d.* in the *Temple-Hall*. *A* tenders the 12 *d.* to *B*; who accepts it, but not in the *Temple-Hall*. The Queſtion was, Whether this was a good Revocation in Equity? Truly I believe it was a good Revocation in Law.

For ſuppoſe a Man makes a Leaſe reſerving a Rent payable at *Michaelmaſs*, in the Middle-*Temple-Hall*, and there is a proviſo of Reentry upon nonpayment according to the Reſervation. The Rent is paid by the Leſſee at the Day, but not at the Place; and the Leſſor accepts the Rent, and afterwards Reenters for breach of the Condition. If he have once accepted the Rent, being privy to the Deed, that makes it a good performance of the Condition in Law abſolutely. So is *Co. Litt.* 212.

And ſo it is in caſe of a Bond to pay Money at a Day and Place certain; the Money is paid before the Day, and not at the Place, and the Obligee accepts the Money. If he after bring an Action upon this Bond, the Defendant can plead nothing but payment according to the Condition: and in Evidence he may give it in Proof, that though it was not paid at the Place and Day, yet being received by the Obligee before the Day at another Place, this is good Evidence at Law of Payment according to the Condition. And that appeared in the Caſe of *Band* and *Richardſon*, *Moor*, 267. *Aderſon*, 198. *Cro, Eliz.* 142. And this Caſe of *Thorne* and *Newman* I take to be a good Performance at Law; where indeed the Condition is to be performed to a Stranger that will alter the Caſe, but where it is to one that is privy to the Deed, I take it it is a good performance at Law, and conſequently muſt be good in Equity.

Another Caſe cited was that of *Smith* and *Aſhton*, and that was thus. One *Richard Aſhton* conveys his Eſtate in Uſes, with a Power reſerved in the Conveyance by any Writing under his Hand and Seal, to make proviſion for younger Children. Being ſick, he prepares Inſtructions under his Hand, in order for Counſel to draw it into Form; and it is drawn into Form and ingroſſed: But before it is ſealed, he dieth; and this was held a good performance of this Power in this Court. So here is a Defect in the Execution of a Power help'd in a Court of Equity.

As to this Caſe, I would obſerve, firſt, this is not a Caſe upon a Power of Revocation, to deveſt an Eſtate, nor a Performance of a Condition. But further here are Inſtructions prepared, and it went as far towards the Execution of the Power as could be, till an Impediment came in the way by the Act of God in the Death of the Party. Now I agree, where there is an Impediment

by the Act of God, or Fraud or Default of the Party, who claims by the Deed, Equity may interpoſe. But that doth no way come up to the Caſe in Queſtion.

Then there is the Caſe of *Dey* and *Thwaites*, which was lately in this Court. *Thwaites* makes a Settlement to the uſe of himſelf for Life, and afterwards to ſuch Child and Children, and for ſuch Eſtate and Eſtates as he ſhould by any Writing under his Hand and Seal, teſtified by two credible Witneſſes, limit and appoint. He afterwards makes a Will, and has but two Witneſſes to it, (ſo that they did not cite the Caſe right, that ſaid there were not two Witneſſes); but two Witneſſes are not enough by the Statute to make it a good Will; and thereby he giveth a Rent of 100 *l.* a Year to ſuch a Child, and dies.

Now one great Queſtion was, Whether the Power being to limit Eſtate or Eſtates, he might limit a Rent out of thoſe Lands? It was held in Equity he might; and truly I think that he might at Law. There is, I confeſs, an Opinion againſt it in the Caſe of *Brown* and *Taylor*, where there were three Judges againſt one. But really I think it is good at Law.

A ſecond Queſtion was, Whether this being void, as a Will by the Statute ſhould be, yet a good Declaration of the Truſt, and an Execution of the Power? And I think the Court of Equity did very well in decreeing it to be Good. For tho it were not effectual in all Points (as it was intended) as a Will, yet it was a Writing which had all the Circumſtances required by the Power; and therefore I ſee no reaſon to queſtion whether it were Good.

The next Caſe is the Caſe of *Ward* and *Booth*; and that ſtands thus: Sir *Thomas Brereton* made a Settlement, with a Power of Revocation, by a Writing under Hand and Seal before two Witneſſes; and he in a Paſſion one day tore off the Label with the Seal, but afterwards repented. Delivered it to the Truſtees to be preſerved to the Uſes: And enquiring whether what he had done amounted to a Revocation? and being adviſed it did not, he was very well ſatisfied. This Cauſe came to be heard before my Lord *Nottingham*, and adjudged no Revocation, it appearing there was a continued Intention not to revoke. But I deſire to read part of the Ground that Decree went upon, for that juſtifies what I ſaid, in caſe where there is a Diſability or an Impediment by Fraud, this Court may relieve though there be a formal Revocation.

There is but one Precedent more that I ſhall mention, and that I take to be directly for the Earl of *Bath*. It is the Caſe of *Arundell* and *Philpott*. *Mary Philpott* being a Widow, ſeized of Lands, made a Settlement upon the Defendant, with a Power of Revocation upon the tender of a Guiney. She afterwards makes another Settlement upon the Plaintiff, but without any proof of the tender of the Guiney. Upon a Bill ſuggeſting her Intention to revoke, the Plaintiff could not prevail in this Court to ſet aſide the firſt Settlement, but was diſmiſt to Law, and ordered to try the Title within a Twelve-month, whether Revoked or not Revoked. And there were afterwards a Trial, and the Tender of the Guiney did happen to be proved, and ſo the Power was well executed at Law. But this Court would not interpoſe to ſet it aſide as a Revocation in Equity upon the Intention only, without a proof of the due Execution.

And upon the whole Matter I conclude, that in a Court of Equity there cannot be a Revocation of a Deed, to which a Power to revoke is annex'd, but what is purſuant to that Power, unleſs there be either an Impediment from the Party that claims by the Deed, or a real diſability to execute according to the Circumſtances. And I think neither of theſe are in this Caſe, nor are any of thoſe Matters alledged of Surprize, Circumvention, Concealment, or the like, any good grounds to ſet aſide this Deed, if they were proved, which I think there is no pretence of.

Lord

Lord Chief Juſtice TREBY.

I Am of the ſame Opinion with my Brother *Powell:* I ſhall ſtate the Caſe as it ſtands upon this Deed and Will. The Will was made in 1675, the Deed in 1681; and ſhall take notice (as I find there was much uſe made of it on one ſide) of what the Expreſſions are in the Will, and ſomewhat of what Deficiencies there were of Expreſſion in this Deed.

In 1675, the Duke of *Albemarle* made his Will; and by that Will he declares, That in reſpect of my Lord of *Bath*'s being one of his neareſt Kindred, and out of Gratitude due to him for many Acts of Friendſhip and good Offices done to him and his Family, his Will was that he ſhould inherit all the Parts of his Real Eſtate not therein otherwiſe diſpoſed of; and therein he deſires the King to grant to the Earl of *Bath*, and the Iſſue Male of his Body, the Title of Duke of *Albemarle*; and that his eldeſt Son might bear the Title of Lord *Monk:* And this was intended in Truſt to pay all his Debts and certain Legacies in the Will. He therein gives a Legacy of 1000 *l.* to *Henry Monk*, not the Father of the Plaintiffs the *Monks*, who it doth not appear was any ways related to him.

Six Years after, in 1681, this Duke *Chriſtopher* makes a Deed; and in that Deed recites this Will true as to the Date, but miſtakes it in ſeveral Particulars. This Deed ſettles the main part of the Eſtate after the Duke and Dutcheſs their death, without Iſſue by the Duke, upon my Lord of *Bath*, part of it immediately after his own death, without Iſſue, other parts upon Sir *Walter Clarges* and Mr. *Greenville:* And it has been obſerved, that almoſt all the Limitations of the Eſtates in the Deed differ from thoſe in the Will, at leaſt in expreſs Terms, if not in very Subſtance.

This Deed alſo ſets forth the Grounds why the Duke made it; and it is to this Effect. He doth declare he was ſo unfortunate, that his next Heir at Law was deſcended from a Regicide, and therefore I would obſerve it was not only to confirm the Will, as they would have it, but for preventing ſo diſhonourable a Deſcent of the Eſtate which he owed to the Bounty of the Crown, and for conveying and ſettling, and aſſuring the Lands to the Uſes thereinafter declared, and confirming and corroborating that Will which he did not intend to revoke, and to prevent any Claim either by the Heir or any pretended ſurreptitious Will, which might be obtained from him by Surprize: Theſe are the Conſiderations and Reaſons expreſſed in the Deed, why he gives this Eſtate away from his Heir at Law.

Both this Deed and Will agree in this for ſubſtance, that they limit the main part of the Eſtate to the Earl of *Bath*, tho they differ in ſeveral of the Limitations to divers Perſons: and as to ſome of the Limitations to the Earl of *Bath*, they differ too; whether material or no, ſhall be conſidered by and by.

There is in this Deed a Proviſo, which makes the great Queſtion in this Caſe, that the Duke ſhould have Power to revoke any of the Uſes in the Deed, and limit new ones: but this Power is reſtrained by ſeveral Circumſtances; it muſt be by writing under his Hand and Seal in the preſence of ſix Witneſſes, three whereof to be Peers of this Realm, and a tender of 6 *d.* to the Truſtees named in the Deed.

Afterwards in the Year 1687, the Duke makes another Will, and thereby he giveth ſome Parcels of his Land to Mr. *Bernard Greenville* my Lord of *Bath*'s Brother, Sir *Walter Clarges* and others, and makes ſome larger Proviſion for

for the Dutcheſs for her Life than ſhe had before; but the main bulk and reſidue of the Eſtate, is by this Will given to Colonel *Thomas Monk*, Father of the Plaintiffs: And he doth likewiſe in that Will make a Petition to the King, that he will be pleaſed to confer a Title of Honour upon him, and make him Baron *Monk* of *Potheridge*, the Ancient Seat of the Family.

That Will of 75, and the Deed of 81. are ſubſcribed by ſix Witneſſes each, this Will of 87 but by 3; and ſo the defect of this Will to make it a Revocation is, that there are but three Witneſſes, and none of them Peers, and there was no tender of *6 d.* to the Truſtees.

The intent of the Earl's Bill is, to have an Eſtabliſhment of this Deed againſt this laſt Will; and the intent of the Dutcheſs and Mr. *Monk*'s Bills is to ſet aſide the Deed and eſtabliſh this laſt Will, and that upon certain Grounds of Equity, the Deed having obtained a Verdict for it at Law.

This is the general State of the Caſe, the particulars will be brought in beſt under the ſeveral Heads that I ſhall mention: But firſt I ſhall take notice as I go, what Progreſs this Cauſe has had ſince it was firſt in Agitation.

Firſt, it was inſiſted, That this Deed was a falſe Deed, and that was thought fit to be directed to a Tryal at Law; and it was moſt proper it ſhould be ſo; for it concerned a great Inheritance and Free-hold conveyed by Deed, and a Deviſe, both Titles at Law, and that was fit to be decided in the proper Judicature for ſuch things, in a Court of Common-Law by a Jury. Accordingly, this Tryal was directed in an Ejectment at the King's Bench Bar, and this Court ſo far aided the Parties to come to the proper Queſtion, as to order there ſhould no Incumbrances ſtand in the way, or be inſiſted upon, but any thing that obſtructed the Tryal of the Right ſhould be ſet aſide: So that in ſhort, the Validity of this Deed was the thing directed to be tryed; it was accordingly tryed, and thereupon a Verdict obtained that the Deed was a good Deed, and the Earl of *Bath*'s Title under it, good at Law; and Judgment was afterwards entred up, and that for the Defendant's part was not concluſive; if there had been any Miſdemeanour on the other ſide, or in the Jury, they might have had redreſs by applying to this Court for a New Tryal; nay, they may try it again, when they pleaſe upon a new Ejectment: But they have acquieſced under it to this day, that is to ſay, now for two Years together; ſo that we muſt take it for granted (at leaſt this Court is, I conceive, bound by it) that it is a true Deed, and a good Conveyance of the Eſtate, as much Evidence there is of it as is poſſible; ſo ſtrong an Evidence, that we muſt take it to be a true and a good Deed, and a Deed without Suſpicion; Twelve Men, beſides the Witneſſes to it, have Sworn the Validity of it (that being the ſole Queſtion before them) and this muſt be remembred all along in the Conſideration of this Caſe.

Indeed the Counſel on the other Side did ſeem to ſpeak a little ſlightly of it, as upon a doubtful Evidence, and at laſt, that it is true by this Verdict they muſt admit that this Deed was ſealed by the Duke, though that was not a little controverted before: But in truth, here is the Right tryed, it was a Deed that was a Conveyance of the Eſtate, and now we muſt take it for granted, that the whole of the Deed was tried and confirmed by the Verdict; ſo that it is a good Conveyance at Law, and paſſeth all that the words can carry. And therefore in our Conſideration of this Caſe, we muſt lay aſide all the Evidence that was, or was properly to have been given at the Trial, as to the Truth and Validity of the Deed: And I, for my part, can allow my ſelf no Conſideration of this Deed in ſpeaking to it, but ſuch as

are Conſiderations of Equity, conſiſtent with the Truth of the Deed.

And that is now the only thing that is to be applied unto, what there is in Equity and Conſcience, why this Deed ſhould be ſet aſide when it is allowed to be good in Law; there is no doubt but there may be good Ground in ſome Caſes in Equity to ſet aſide that which is good at Law. But the Queſtion is, whether in this Caſe there be any ſuch or no.

But before I proceed to the Conſideration of what has been inſiſted upon in that kind, I deſire to take notice of ſome things about the Will of 87. I am very well ſatisfied that that Will is well proved: There is my Lord Chief Juſtice *Pollexfen* hath proved the Inſtructions given for the preparing it, and the drawing of it; and there are three Witneſſes that ſpeak to the Publication: and this is confirmed by the Teſtimony of Sir *Robert Clayton*, who tranſacted the firſt Part of that Affair, to bring the Duke and my Lord Chief Juſtice together: and I do equally reject all the Evidence on the one ſide and the other, againſt the Truth of either the Deed or this Will.

Then this Will would have been a good Diſpoſition of the Lands, if the Law did not hinder, that is, if this Deed did not ſtand in the way, as a prior Diſpoſition, and found good in Law; ſo the Deed is good, if Equity do not hinder it. Now the Grounds of Equity, which my Lord *Mountague*'s Counſel inſiſt upon, are, I think, theſe: I have made indeed but four of them, but in Subſtance I do not differ from my Brother *Powell* about them, for I comprehend that the Deeds being Ancillary, as it was called, and attendant upon the Will under the Head of a Revocation in Equity; I ſay, the Heads of Equity inſiſted upon, to ſet aſide this Deed are four.

Firſt; Surprize and Circumvention in obtaining of it, and that relates to the Creation of it.

Secondly; Concealment from the Duke, and this by my Lord of *Bath*, and ſo he was not informed how his Power was circumſtanced, and therefore not able to execute his Power according to the Circumſtances, which makes it become a fraudulent Deed, and for that Cauſe the Plaintiffs ſhall have Relief againſt it.

Thirdly; Here is a Revocation in Equity, though it be not in all Points ſuch as would be ſufficient in Law, yet here is ſo much done towards it, ſuch a Solemnity in the Action done, and ſuch an Impediment of doing more, as will amount to an equitable Revocation.

The fourth Head is that which was mentioned of the Truſt in the Deed.

As to the firſt Point of Surprize, it was a Head much laboured by the Counſel on the Plaintiffs ſide, and yet I confeſs I am ſtill at a loſs, for the very Notion of Surprize, for I take it to be either Falſhood or Forgery, (that is) though I take it, they would not uſe the word, in this Caſe, *Fraud*; if that be not the Meaning of it, to be ſomething done ſuddenly and unawares, not with all that Precaution and Deliberation as poſſibly a Deed may be done.

Here was a Caſe cited not long ago, in another great Caſe in this Court out of the Civil Law, about Surprize, but that was under another Head; that is, a Man was informed by his Kinſman, that his Son was dead, and ſo got him to ſettle his Eſtate upon him: this is called, in the Civil Law, *Surreptio*; I know not whether that Word will anſwer thoſe Gentlemens Notions about this Matter. Now the Civilians define that thus, *Surreptio eſt cum per falſam rei narrationem aliquod extorquetur*; when a Man will by falſe Suggeſtions prevail upon another to do that which otherwiſe he would not have done.

And I make no doubt but Equity ought to ſet aſide that, but then this is

Properly called *Fraud*, and that muſt be made out, it can never be intended. I find not any ſuch thing pretended to be made out, that my Lord of *Bath* did uſe any falſe Suggeſtions to the Duke, or Informations at all, for what appears in the Proof; I beg Pardon if I miſtake or forget any of the Proof.

Then here is Matter of a Surprize objected, which muſt be ſomething that will not avoid this Deed at Law, but will avoid a Deed in Equity, which yet is not direct Fraud or Falſehood in the Party, but is to be gathered out of the particular Circumſtances of the Caſe; but what in certain to make of it, I confeſs I cannot tell.

I would repeat the Words that the Plaintiffs Counſel uſed; they ſay it is abſurdly drawn, it was unduly put upon the Duke, 'twas done without his peruſing it, or having it read to him; it was contrary to his common Intention, before and after the Sealing of it. It muſt be admitted that there was Deliberation, and Conſideration, and Intention enough proved to make it a good Deed at Law, otherwiſe there would not have been a Verdict for it: but it ſhould ſeem there was not enough of theſe in Equity, and the want of this is what they call Surprize, and that muſt avoid this Deed in Equity.

But I confeſs I am not ſatisfied that there were any Surprize in this Caſe in any thing; the Duke at the time of making this Deed was under no Force, no Reſtraint, no falſe Information, as I obſerve, no nor any Solicitation from my Lord of *Bath* at all; he was in his own Houſe at his full Liberty, he was in very good Company; for I take it for granted, (as I ſhall inſiſt further by and by) that Sir *William Jones* was by at the Execution of this Deed, and a Witneſs to it; the Duke was under no Sickneſs, no Weakneſs: and I muſt take notice of one Proof more which was mentioned, he had not been drinking, but was in very ſober Company. This appears to be the Condition in which the Duke was at the Sealing of the Deed in queſtion.

But let us conſider what are the Particulars of Surprize, that they who oppoſe this Deed inſiſt upon; I think they are reducible to theſe three: There was a want of collateral Circumſtances that uſe to attend the Execution of Deeds, made with good Deliberation, and without Surprize: Then there are ſome Obſervations made upon the wording of this Deed, which argue Surprize; and then they ſay it muſt be obtained ſurreptitiouſly, becauſe it is contrary to his conſtant Intention, and all the Courſe of his Actings, as well before as after that time.

Firſt, they ſay there is a want of Collateral Circumſtances that are to attend the Execution of Deeds made with good Deliberation, and without Surprize, and that it appears in theſe Particulars.

Firſt, it doth not appear who drew this Deed: It is certain, they ſay, that it could not be Sir *William Jones*, and I think ſo too: They obſerve, and with very good Reaſon, that he ſaying, I approve of this Proviſo, doth prove that he did only concern himſelf with the Proviſo, and did apply himſelf ſingly to that, and did not manage the Body of the Deed.

Then it doth not appear that the Draught of this Deed was read, or the Deed ſubſigned or counterſigned by Counſel, as was the Duke's uſual Method; nor was there any Counterpart of the Deed: Whereas to the Will of 87, it was carefully drawn and made, and three Parts of it prepared, and then there were very great Perſons concerned as Truſtees in this Deed, and yet ſeveral of them knew nothing of it.

To this I muſt acknowledg, that the Objection is for the moſt part true; but how far it is an Objection, we ſhall conſider farther by and by.

Firſt

First for the want of Instructions about the drawing this Deed, this is now above 10 Years before it comes in question; and such Instructions there might have been, but in length of time lost or laid aside; and when once a Deed is actually made, great Persons as well as lesser ones are careless of the Preparations for such Deeds: the Deed binds the Estate; and if that be carefully kept, there may easily be a Negligence as to the rest.

I did observe before, that though the particular Limitations in the first Will, and this Deed, do differ, yet both Deed and Will do agree in Substance to settle the Bulk of the Estate to my Lord of *Bath*: It is likewise observable, that there is a strong Proof Sir *Thomas Stringer* drew this Deed, for his Hand is interlined in every Sheet of the Draught; and as I do remember, his Son writ it: Sir *Thomas Stringer* was at that time my Lord Duke's Counsel; and I confess there have been reported several things about this Matter from his Mouth, which because they are very various and inconsistent, I wish he had been alive, that he might have set all right; but as the Matter now stands here, it has rendred him very doubtful in the Case.

I confess I do believe Sir *William Jones* had too little Patience, (give me leave to say so) and too much Skill to make such a Deed, I speak as to the Art and Skill of framing it; therefore I conceive he did not, but Sir *Thomas Stringer* did.

As to the not reading of the Deed to the Duke, the Defendants Counsel do object, neither was the Will of 87 read to the Duke at the time of his sealing and publishing it: So far is true, that after it was ingrossed and brought to Sir *Robert Clayton*'s, it was not read to the Duke; but the Particulars of it he had been acquainted with at the time of the drawing, and so it might be as to the Deed too, for any thing appears to the contrary.

That there was no Counterpart, and that the Trustees were not acquainted with it; the Answer is, That the Duke did intend it as a Secret, and therefore the less notice was to be taken of it: and the Duke intending mainly by it an Advantage to my Lord of *Bath*, it was thought fit to be concealed, for some Reasons, from the Dutchess.

But after all, I know no such Rule in Equity, I am sure none of the Precedents that I have seen come near to it; that where there is a Deed, for the making of which no Instructions are found, no Proof of its being read to the Party at the Execution, no Counterpart, or the Trustees not acquainted with it, that these are sufficient Grounds to set such a Deed aside in Equity: I do not think any of the Precedents, or all of them together (and I am sure I have read them all) will amount to prove any such thing.

The second Matter to make out the Surprize, is some Considerations taken out of the Bowels of the Deed it self, several Improprieties of Expression, as (in part of Dower) and (in full of Dower) which are not Phrases that look like the Act of a Lawyer, one well skilled in the Propriety of the Law-Dialect: It doth likewise misrecite the Will of 75, that is particularly, as to the Lands given to the Dutchess, that they are given for Life, when it was only during her Widowhood: the Lands are said to be given to Mr. *Greenville* as if he were immediate Devisee; whereas it is a Devise to him in Remainder after a Limitation to the Duke in Tail.

But certainly Improprieties of Expressions and Mis-recitals in Deeds, are too slight Acts to avoid Deeds so made, so attested, so proved, as this Deed in question has been: They are rather, and indeed Flaws and Objections that go to the Manner and Form than the Substance, and shew rather want of Art in the Counsel that drew it, than of Honesty or Integrity in the Deed it self; besides that, a Devise to one for her Widow-hood, is a Devise for

Life

Life in one Senſe and common Parlance, though it be defeizable; and a Deviſe to one in Remainder, is a Deviſe to him though not an immediate one.

Another Obſervation out of the Deed it ſelf is, that here are Eſtates limited to the Duke's younger Sons out of Lands, which he had no power to create or carve ſuch Eſtates out of, they being ſettled before upon his Marriage on the eldeſt Son; and that is true it is ſo, as to the Lands called *Norton Diſney*: But there are other Lands not comprized in the Settlement, and all the reſt that were new purchaſed, were in his Power to ſettle as he pleaſed.

But the great Objection out of the Deed is this, that this Deed doth in ſeveral places declare it ſelf to be made to confirm and corroborate the Will of 75. How comes it then to paſs that it ſhould differ from it in all the Limitations except one? and that in the Draught is of my Lord of *Bath*'s own Writing; and that part of the Eſtate is by the Deed to come to the Lord of *Bath*, upon failure of the Duke's Iſſue Male only; ſo that his Daughters are all wholly debarred.

To this I ſay, what they object, (that there is rather a Contradiction than a Confirmation of the Will, is true) I am not ſatisfied I aſſure you in that which the Defendants ſay to it, that the Confirmation of the Will is mentioned only, as to preventing the Deſcent. It is firſt mentioned there, but I think it goeth through and is repeated more than once: But that which I would obſerve is this, that this Deed does confirm the Will in the main, and ſubſtantial part of it, the ſettling the Bulk of the Eſtate upon my Lord of *Bath*.

Beſides, the Expreſſion of the Deed is not only for confirming the Will of 75, but alſo for the ſettling the Lands to the Uſes after declared; and if it doth not confirm every Limitation, yet it doth agree in the ſubſtantial Settlement of the Eſtate.

It was further ſaid, that the only Limitation which agrees with the Will, is that which in the Draught of my Lord of *Bath*'s hand-writing, where Lands are limited to my Lord of *Bath*, after failure of Iſſue-Male, with Excluſion of the Daughters, which the Plaintiffs ſay it cannot poſſibly be imagined the Duke ever intended to do. But I muſt mention what Anſwer the Defendants give to it: They ſay the Duke had then 15000 *l.* a Year, and he makes an Interceſſion to the King to beſtow the Honour of *Albemarle* upon the Earl of *Bath*, and that it might not go alone he limits 3000 *l.* a Year upon his failing of Iſſue-Male; ſo that the Honour ſhould come to the Earl, and there was enough left for Daughters. Now if their Valuation of the Duke's Eſtate be right, (which truly I know not) it is ſome anſwer, why ſome part ſhould be given to the Earl only after the failure of Iſſue-Male.

But then I would obſerve too, the Deed by this Obligation doth confirm the Will of 75, and that Will alſo affirm the Deed: If the Will of 75 were once well, as I ſee no colour to the contrary, then I am ſure all their Objections from the Duke's contrary Intentions are all anſwered, that he never intended to give him his Eſtate; for if they admit that the Will was once the true Will of the Duke of *Albemarle*, then there was once an apparent Intention in the Duke of *Albemarle* to give the Earl of *Bath* the Bulk of his Eſtate if he died without Iſſue.

Now as to the Variations in the Limitations of the Deed, from thoſe in the Will, I think truly it ſtands indifferent as to one ſide or other. For here was the diſtance of ſix Years between them, and the Duke might alter his Mind;

Mind; it might be one way one time, and another time another: he might alter his Mind as to his Daughters; he might after ſo many Years deſpair of Iſſue, and ſo not mind the making any Proviſion for them: He might change his Mind as to his other Kindred, and therefore might in theſe Particulars vary in the Deed from the Will of 75.

But I would ſtill have this obſerved, that in ſubſtance they do agree; he doth preſerve the ſame Favour and good Intention for my Lord of *Bath*, to give him his Eſtate as his neareſt Kinſman. If then theſe Limitations in the Deed were purſuant and agreeable to the Duke's then Mind, it is no matter if there be any ſuch Variations or Alterations from what was in the Will; and that it was agreeable to his Mind then, I ſhall by and by take notice of ſome things that occur in this Caſe, and which ſeem to ſatisfy me in it that this was his Intent. For I did obſerve that one thing they inſiſted upon to ſhew it was by Surprize, was, that this was contrary to the Intentions of both the Duke of *Albemarle*, and the conſtant Series of Purpoſes in the Family; and they undertake to give Inſtances of it.

The Defendants Counſel ſay, that his Intention was to give his Eſtate to the Earl of *Bath*, who was his near Kinſman, to whom he had very great Obligations; that my Lord of *Bath* was concerned in that great Action of Reſtoring the Royal Family, which was the Raiſing of his own; that he was a conſtant Friend of Duke *George* and his, and his Sons chief Counſellor and Adviſer; and that the Family were under great Obligations, is and muſt be admitted both from what is in the Deed expreſſed, and what is otherwiſe proved.

But the Plaintiffs ſay no, they had no ſuch Intention neither one or other of them, and particularly Duke *Chriſtopher* had none neither before the making of this Deed nor after. Duke *George* he makes his Will in *June* 1665, wherein he gives all his real and perſonal Eſtate to his Son, and nothing at all to my Lord of *Bath*. I did look into the Will, which is very ſhort, and there is nothing given to any Body but his Son: That is the whole of the Will. Then in the Year 1669, is the Settlement made by Duke *George* upon his Son's Marriage; and there is nothing ſettled upon my Lord of *Bath*, not ſo much as a remote Remainder. In 73 Duke *Chriſtopher* makes his Will, and therein gives great Legacies to the Dutcheſs, but none to the Earl of *Bath*.

Theſe are Inſtances before this Will and Deed, but the Anſwers given them are theſe; which make me not ſatisfied with the Plaintiffs Objection or Proofs of his never intending to give my Lord of *Bath* his Eſtate.

Firſt, as I ſaid, Duke *George*'s Will is very ſhort, and takes notice of no Body but his Son; and as he gives nothing in it to my Lord of *Bath*, ſo neither doth he to any Body elſe; and that very Deviſe is void, becauſe it was to the Son and Heir to whom it would without that have deſcended: and it ſignifies very little to their purpoſe, being in the ſame Year with King *Charles*'s Sign-Manual, at his Requeſt, to promiſe the Earl the Dukedom upon failure of Iſſue-Male.

As to the Marriage-Settlement in 1669, there is indeed nothing ſettled on the Earl of *Bath*, ſo much as in remainder; but in ſuch Settlements Men uſually do provide only for the Iſſue of that Marriage, and ſo leave the Diſpoſition of Remainders to Subſequent-Settlements.

As to the Will of Duke *Chriſtopher* in 1673, at that time, they ſay he was but a Minor of 20 Years of Age, and it was only to diſpoſe of his Perſonal Eſtate; for as to his Lands, if he had made any Deviſe of them, it

had been void, and the perſonal Eſtate was at that time about 60000 *l.* But within a Year or two after that, when he came of Age, is the Will of 75 made, and there is a mighty liberal Gift, made to my Lord of *Bath*; and purſuant to his Father's Deſire, and King *Charles*'s Privy-Seal, doth he make that Requeſt for the Dukedom for my Lord of *Bath*.

And it muſt be obſerved upon all theſe things, that as there is nothing given to my Lord of *Bath* in Duke *George*'s Will and Settlement, nor in Duke *Chriſtopher*'s Will in 1673, ſo nor is there any Lands in either of them, nor in the Will of 1675, or Deed of 1681, given to *Thomas Monk*, the Father of the now Plaintiffs; ſo that that Objection is much ſtronger againſt them than againſt my Lord of *Bath*.

Now I do not find any Proof of a Provocation or Cauſe given by my Lord of *Bath*, to make the Duke totally change from this Intention, to give him the greateſt part of his Eſtate, and put him quite out of his Favour, nor doth it appear he was ſo; here were ſeveral Letters read, there have been Copies of them brought us, and I have look'd upon them; againſt theſe Letters it has been obſerved, that there is no notice taken in any of them of this Deed, but there is ſome of the Will of 1687, while the Duke was in *Jamaica*, about the Death of Colonel *Monk*.

I confeſs I cannot ſay there is any one Letter that ſpeaks of this Deed, by the Name of a Deed; but there is one or two that hath an Aſpect upon it, and very near reſpect to it, and cannot refer to any thing elſe, particularly that which was written relating to my Lord *Lanſdown*, when he was going to travel, and another about his Marriage, wherein he takes notice how much he was concerned in him, even next to his Father himſelf, as he very well knew; and that he wrote ſo much about him for Reaſons beſt known to the Earl himſelf, this ſeems to point at ſome Conveyance, and aims at this Deed to my thinking directly.

They have made another Objection, That the Duke never intended to leave any part of his Eſtate to Sir *Thomas Clarges*, becauſe he was under the Duke's Diſpleaſure upon account of ſomething he took ill from him; but that receives an eaſy Anſwer, What is limited to him is but a Remainder, and that of no great Eſtate neither. Beſides that, the Evidence of the Duke's being diſpleaſed with Sir *Thomas*, is but a hearing by a third Hand; but I find no Diſpleaſure proved at all that was conceived by the Duke againſt my Lord of *Bath* to the laſt.

Come we then to the time of making this Deed, and let us ſee whether the Duke did really intend what the words of this Deed do import; and that I think is made evident by Proofs that have not been anſwered or contradicted. The Deed takes notice of the very great and many Acts of Friendſhip and Kindneſs received by him and his Family from my Lord of *Bath*; and it is proved the Duke declared it ought never to be forgotten, nor could he ever make him ſufficient Amends. It ſhould ſeem he had procured his Father's Garter for him when he might have had it himſelf; he thereupon tells Mr. *Prideaux*, that he was ſetling or had ſetled his Eſtate upon my Lord of *Bath*, which muſt be much about the ſame time that this Deed was made. One of the Witneſſes to the Deed ſays, at the ſealing of it he wiſhed he could have done more for him.

But to me one of the cleareſt Evidences of the Duke's Intention to do this for my Lord of *Bath*, and that it was no Surprize upon him, is the Preſence of Sir *William Jones* at the Execution of this Deed; for I do take it upon the Proofs it is moſt evident, that he was then preſent; and I will tell you what

what the Evidence of it is: Mr. *Vivian* ſays, he was often uſed as Counſel for the Duke of *Albemarle*, and principally relied upon; and this *Vivian* happens to be one of the ſurviving Witneſſes, and he poſitively ſays Sir *William Jones* was there and a Witneſs to the Deed; ſo ſays Mr. *Strode* who knew him very well; and the third ſays there was a great Lawyer there, tho he doth not pretend to know him, it is *Clark*: Mr. *Hebblethwaite* ſays he believes the Name endorſed is Sir *William*'s Hand-writing; and no better Witneſs could there poſſibly be for that purpoſe than he, nor could there be greater Evidence, than thoſe multitudes of Inſtruments that were produced in Court, whereby to my Apprehenſion it did appear plainly that the Characters did very well agree.

Now if Sir *William Jones* was there at the ſealing of this Deed, I think I need ſay no more upon this Point: He was a Gentleman very well known to be both of great Ability, and Integrity and Reputation; and he would never have given up all his Honour and Reputation, and the Quiet of his own Conſcience, to make one in a Confederacy of circumventing this Noble Duke, or defrauding any one of his Eſtate; and therefore believing him firſt to be preſent, which I really do, I cannot but conclude that it was really, and *bona fide*, done without Fraud or Surprize.

Beſides this Evidence, there are ſeveral Diſcourſes alſo that have been proved, wherein the Duke hath declared both his Intention, and that the thing was done, which ſheweth he was not ſurpriſed into it: I name Mr. *Crofts* in particular, who muſt be admitted to be a good Witneſs, being one of the three Witneſſes to the Will of 1687, and he ſays the Duke of *Albemarle* told him the Earl of *Bath* was to ſucceed to his Eſtate.

It is indeed objected upon this Head, What needed then all this Privacy be uſed? VVhy ſhould the Duke conceal it from the Dutcheſs his Lady, to whom he had been ſo kind in it? why from the Duke of *Newcaſtle* and the other Truſtees, Perſons of Quality and Honour? They ſay it could not be for any Diſſatisfaction the Duke had with his Dutcheſs, for they always agreed very well together, and they have read the Teſtimony of my Lord Marqueſs of *Carmarthen*, who ſays that he never obſerved a Couple to live better together, or any VVoman to carry it better towards a Husband than the Dutcheſs; and they have produced you ſome Letters from the Duke to her which ſhew great Fondneſs and Affection to her.

Truly in the firſt place, I do not know why any Reaſon ſhould be expected to be given why he uſeth Privacy in any Action he doth; ſure he may, or he may not at his Pleaſure: There may be private Circumſtances that may induce him (and that with very good reaſon) to uſe more or leſs Privacy in the Affairs he tranſacts. But beſides this, they bring you in Proofs, that I cannot but mention, that the Dutcheſs had conceived a Diſpleaſure, tho it be not known for what Reaſon, againſt the Earl of *Bath*; that the Duke was uneaſy under her Importunities to do what he had no mind to, and that was the cauſe of his drinking ſo hard to divert himſelf. The Duke was apprehenſive ſhe would purſue her Diſpleaſure againſt my Lord, and he ſhould have but an unquiet Life if ſhe came to the knowledg of this Settlement, at leaſt till ſhe had prevailed with him to alter it, which he reſolved not to do.

Now it may be (I ſpeak it with all due Reſpect to my Lord *Carmarthen*'s Evidence) that the publick Carriage might be plauſible, eſpecially in the preſence of one of his Quality, and yet there might be ſome late Diſpleaſure which might break out amongſt themſelves whenever my Lord of *Bath*

came

came in Competition with thoſe for whom my Lady Dutcheſs had more Affection, and would make uſe of her Intereſt in the Duke about it; and the Counſel for the Plaintiffs could very hardly maintain but that the Duke had once an intention that my Lord of *Bath* ſhould have his Eſtate, till, ſay they, he came to have the knowledg of one of his own Name, whom he deſigned to prefer and provide for.

If ſo, then I am ſure, the firſt time that any ſuch change of Mind doth appear, is by this VVill of 1687, for before that they do not pretend to any thing done for Colonel *Monk*; and that will ſerve to anſwer that Objection, that this Deed of 1681, was againſt the Duke's conſtant Intent before and at that time.

It is true, he doth call Colonel *Monk* Couſin in his VVill of 1687; whether he was akin to him or no, doth not appear in proof at all in the Caſe, but on the contrary, it is in proof that my Lord of *Bath* is really near akin to him; and it was as much his Intent when he made this Deed to keep up his Title and Honour in my Lord of *Bath*'s Family, as can be imagined or conceived.

As to the VVill of 1687, that doth declare his laſt Intention, and that they ſay is moſt probable, that my Lord of *Bath* ſhould not have the Eſtate, but Colonel *Monk* ſhould: for it was a VVill made with a great Deliberation, being five or ſix Months preparing, great Advice about the drawing of it taken, particular Inſtructions by himſelf given, ſeveral Copies made and left with ſeveral People. On the other ſide, they obſerve the diſtance of Time, ſix Months between the Preparation and Execution, which is not an Argument that he was very forward to do it, but rather an Argument that he was very unwilling to do it; and the very time of executing it was when he was very uneaſy about his being forced to execute the Conveyances of *Dalby* and *Broughton* to my Lord *Jefferies*: His Mind was then diſturbed; but if he had had a real Intention and Purpoſe to revoke the Deed, he had an opportunity to get this Revocation done in their Preſence, and afterwards he might eaſily have got a third Peer.

The great Objection is, VVhat ſhould the Duke take all this Pains for, and this Care and Thought about the Preparations for this Will, ſo carefully execute it, deliver the ſeveral Parts to ſeveral Perſons, and all for nothing? I do admit it is a great Objection, and I think there is but one Anſwer to it, but that is a pretty plain and ſtrong one, VVhy was all that Care and Thought uſed about the Will of 1675, and the Deed of 1681? did he intend nothing by it then? And if he did then intend ſomething, what Provocation, what Demerit, what was done or left undone by my Lord of *Bath*, to change the Duke's Mind, that whereas before he gave him all his Eſtate, now he ſhould give him never a Farthing? Truly I think it was the Duke's intent to do this laſt Act only for his own Eaſe. He knew the Dutcheſs had a Diſpleaſure to my Lord of *Bath*, and therefore he himſelf deſigning to expreſs his Kindneſs to my Lord of *Bath*, would make ſuch a Deed, and put it out of his own Power to alter it upon any ſlight Attempts, or unleſs he ſhould have reaſon to change his Mind towards him upon extraordinary Occaſions and Circumſtances; ſo by not applying with theſe extraordinary Terms in the Power, he could preſerve his Purpoſe towards my Lord of *Bath* notwithſtanding any Attacks upon him, and yet by ſuch a Will as this he could pacify the Importunities of the Dutcheſs, who not knowing of the Deed, did acquieſce in a Settlement by Will, ſo things might paſs eaſily, and he not being diſturbed by any Bickerings or Miſunderſtanding between the Dutcheſs and my Lord of *Bath*. And

And truly it appears by what Dr. *Berwick* ſaith, That the Duke was to buy his Peace at home by ſuch a compliance: For he was told, the Dutcheſs would be very bad as to her Diſtemper, if her deſires were not anſwered; and in *Jamaica* there is Proof of very great uneaſineſs the Duke was under, the Chamber was lock'd up, and Perſons that came to him were forced to come in at the Windows.

I have been long upon this Head of Surprize, becauſe it was ſo much laboured by the Counſel for the Plaintiffs; but after all this, I think it is but a ſhort Point. Here is a Deed made in 81, fully proved, and found to be a good and true Deed by a Verdict at Law, and as ſuch, is a good and ſufficient Conveyance of the Land at Law; and there is made to my Lord of *Bath*, purſuant (as to the Ground and Subſtance of it) to the Will in 75, though all the particular Limitations do not agree: here is no Fraud, no Falſhood proved, no Practice that appears at all upon the Duke to obtain it. But here is the want of a Counterpart, and want of Notice to the Truſtees, and there muſt be Matters to make out a Surprize to ſet aſide this Deed.

I confeſs, I am at a very great loſs upon what Ground of reaſon that Rule is founded, and am totally to ſeek for a Precedent to be guided by in the Caſe, and therefore I cannot but be of Opinion that it cannot be ſet aſide in a Court of Equity upon that Point.

The next thing is that of Concealment; They ſay, that this Deed was ſecreted and concealed by my Lord of *Bath* from the Duke of *Albemarle*, that he might not know the particular Circumſtances of his Power, ſo as to purſue them when he had a purpoſe to execute it; and this they ground upon a Matter of Fact, which they ſay is teſtified by one of the Witneſſes to the Deed, that the Deed at the time of the Execution was delivered to the Earl of *Bath*, and ſo they ſay it was kept by him, and the particulars of the Power were forgot by the Duke, and ſo he was not informed what he ought to do, nor enabled to make a perfect Revocation. They ſay likewiſe, this Deed was concealed and not diſcovered upon the Sale of part of the Eſtate conveyed in it to my Lord *Jefferies*, and Leaſes and Annuities granted. But that which they inſiſt upon (as I by my Notes take it) is a paſſage in my Lord of *Bath*'s Anſwer to their Bill, That about the Year 1686, my Lord Duke ſent to the Earl for his Will in order to make a new Settlement of his Eſtate, and this was juſt before he made the Will of 87.

Now truly I think it may have this ſhort and plain Anſwer, The Duke if he had a Mind to revoke this Settlement, had more need of the Deed than the Will, he might revoke the Will without looking into it by making a ſubſequent Will; but he could not revoke the Deed, becauſe he was by the Proviſo circumſcribed to the obſervance of ſuch and ſuch Circumſtances; ſay they, thoſe Circumſtances the Duke be apt enough to forget: and then when he knew the Duke's purpoſe to alter the Settlement of his Eſtate, my Lord of *Bath* ſhould have been ſo ingenuous as to have ſent the Deed, or have acquainted him with the purport of it, and ſhould have conſidered that the Duke did moſtly need that to effect his purpoſe, more than the Will to revoke, that he might obſerve the Statutes of Frauds and Perjuries required by three Witneſſes to make a good diſpoſition of Lands by a Will, and without much ado, that might be complyed with: But yet all the while this

Power not being obſerved, all his Counſel by ſubtil Advice, told him would ſignifie nothing, therefore he would not diſcover that, and not doing it, it muſt be a fraudulent concealment in him ſufficient to ſet aſide this Deed.

They ſay it's no Objection, that this was not a fraudulent Conveyance in its Creation for every Man; ſhall be relieved againſt that which being by Fraud concealed from him, he could not make ſuch reaſonable Proviſion againſt, as if he had known of it he might have done. Truly, I do think this is the beſt Ground of Equity that has as yet been offered in this Caſe; and were it not grounded upon Facts, which in truth upon the proofs are quite otherwiſe, I ſhould think it were a good Ground for Relief: for wherefoever a Man doth endeavour to inform himſelf of the Circumſtances of his own Power and Condition, in order to revoke ſuch a Settlement, where he has a Power ſo to do, and is hindred from coming at the knowledge of them, and eſpecially by that Perſon whoſe Intereſt it is to prevent a Revocation, he ought to be relieved in ſuch Caſe: For it is againſt good Conſcience that any Man ſhould profit by any ſuch ſiniſter Practices. Therefore I ſay, the Objection were good, if the Fact were true.

But alas, it is founded in this Caſe upon Preſumption meerly: It doth not appear that the Duke was deſirous, or needed to be informed at all in the Matter, or that he did really intend a Revocation. We do not hear any proof that he did ask or ſpeak to any Counſel about it. Nor is it true in Fact, that the Duke ſhould expect the Deed out of my Lord of *Bath*'s hands, nor indeed could he expect any ſuch thing; for I take it, it ſtands plain in proof thus.

My Lord of *Bath* ſays in his Anſwer, That the Deed was delivered to, and kept by the Duke: They ſay, that Anſwer of his, being a Defendant, is not to be regarded; for it is replied to generally, and ſo the Facts not acknowledged any further than they are proved. But to that, I ſay, the Plaintiff muſt prove that this Deed was in my Lord of *Bath*'s hands; they ſay *Aleman* proves it, who ſays it was delivered into the Earl's hands. This was look'd upon as ſo material a Point in this Caſe, that the Depoſition was called for to be reviewed; and upon reading it again, it was plain it muſt be underſtood of the delivery of the Deed only to execute it, and make it a good Deed, not a delivery into his Cuſtody.

Nay, there is farther ſtrong Evidence, that it was in my Lord Duke's hands, and not in my Lord of *Bath*'s; for Sir *Thomas Stringer* doth a little before the Duke went beyond Sea, make an Abſtract of it, and delivers it to his Man to make a Copy of: And when after the Duke's Death both Deed and Will were produced under one Cover, (but it is plain the Will was delivered to the Duke) this anſwers it, and agreeth to what my Lord of *Bath* ſaith in his Anſwer, that they were both delivered to him by the Duke a little before his going to *Jamaica*, under that Cover, and ſealed with the Duke's own Seal, and ſo they are found.

And truly if it were but doubtful whether it were in the one hand or the other, we muſt not determine that it was in my Lord of *Bath*'s hands, or convict him or any Man of Fraud where the Evidence is doubtful; it ought to be proved, and plainly proved; for Fraud is a thing odious, and never to be intended or preſumed.

But

But the truth was, this Deed was concealed not from the Duke, but from the Dutcheſs, that ſhe or her Counſel ſhould not get at it to procure a Revocation.

As for the Caſe of *Charles Clare* that was mentioned, it doth not in any ſort come up to this Caſe: he had lent Money upon a Statute, afterwards Money is lent upon a Mortgage of the Lands liable to that Statute: He ingroſſeth the Mortgage, and never diſcovereth the Statute; the Lands were not worth more than the Mortgage Money; and by reaſon of this Concealment it was adjudged Fraud in him, and he ſhould have no benefit of his Statute againſt the Mortgagee. Here was a knowledg proved in the Caſe, which is not in my Lord of *Bath*'s, that the Duke would revoke; and yet I muſt needs ſay, and I appeal to thoſe Gentlemen that uſually attend at this Bar, whether they did not think it a hard Caſe.

And as to the Caſe of *Raw* and *Pott*, beſides, that it was a Caſe between a Younger and an Elder Brother, and ſo might have a better Ground or Handle for Equity, yet I think it was juſtly decreed, becauſe the Party knew it and concealed it on purpoſe, and encouraged the thing; for when he was asked why he did not diſcover it? then he anſwered, If he had, then there would have been a Fine levied and a Recovery ſuffered, and then he knew all would have been well enough; but there is no ſuch matter as knowledg or the like here.

The next Head of Objections is that of a Revocation in Equity; and for that the firſt thing inſiſted upon is this: They would have the Deed of 81 to be depending upon the Will of 75; it was ancillary, it leaned upon it; and therefore this Will of 87 revoking the Will of 75, revokes likewiſe the Deed of 81: And for this they did cite two Caſes out of *Dyer*; The firſt is, *fol.* 49. 6. A Man makes a Feoffment to perform his laſt Will, and the Will is annext to the Charter of Feoffment, and Livery of Seiſin is made; accordingly it was adjudged that he might alter and revoke that Will, though it took effect by the Livery: For that doth not alter the Nature of a Will, which is always revocable by the laſt Will; But doth that revoke the Deed too? No certainly, the Deed ſtood good, and there is nothing to the contrary appears in that Book.

The other Caſe is *Dyer* 314. 6. A Man by Deed indented declares, That whereas he had ſuffered a Common Recovery to the intent to perform his Will touching the Diſpoſition of his Lands, he Wills ſo and ſo; and whether he could during his Life alter the Uſes in this Indenture, was the Queſtion; and it is held he might: For this Indenture is *quaſi* a Will which is changeable; I will go further than that, I ſay it was a Will, or it was nothing; for though it were in form of an Indenture between ſeveral Parties, yet when he ſays he Wills ſo and ſo, after he had recited a Power to declare by Will, this muſt be taken for a Will, or it is no execution of the Power: for when a Man ſuffers a Recovery, or makes a Conveyance to me of his laſt Will, he hath two Intereſts in it; he may diſpoſe of it as Owner, or by way of Direction; If he will diſpoſe of it by way of Direction as this was, he muſt follow the Method preſcribed, and that muſt be by Will, and ſo this muſt be a Will, or no execution of his Power. But what is that to this purpoſe, that a Will, which a Deed is made to Confirm

firm being revoked, that ſhall revoke the Deed too; ſure that is no conſequence, nor hath any Ground upon this Caſe.

But then, ſay they, here is a Revocation, and that a Revocation in Equity: for though it be a good Deed in Law, yet there is ſuch a contrary diſpoſition by this Will, as muſt revoke it, being revocable according to the Power. Indeed here is not the Number of Witneſſes required, nor the Quality, nor a tender of the Money and Powers of Revocation: for it is natural Equity, that he who is Owner of an Eſtate ſhould diſpoſe of it as he pleaſeth. But there is another Rule of Law that is as certain as any other, that all Circumſtances muſt be obſerved, or the Power not well executed; and that is *Scroop*'s Caſe, and other Caſes that have been mentioned: And tho' the Law will go as far as it can to expound the Circumſtances as a Performance, yet a Performance is neceſſary.

The Foundation for this Revocation in Equity, which the Plaintiffs go upon, is this, Where there is a deliberate Intent to make a new Settlement of the Eſtate, and a Man goeth as far as he can to make it, there Equity ſhall ſupply any Defect.

Firſt, I muſt deny that in this Caſe the Duke of *Albemarle* hath done all that he could do; for he thought ſix Witneſſes neceſſary to the Will of 1675, and ſix Witneſſes to the Deed of 1681, and ſo provides in this Power for Revocation, beſides other Circumſtances, and here are only three Witneſſes to this laſt Will.

Neither is this a proper Settlement of a Family; for it doth not appear that Mr. *Monk*, who is mainly taken care of in this laſt Will, was any kin to the Family at all: Nay, it ſhould ſeem the Duke was not ſpontaneous about it; for he would have the Dutcheſs pay the Counſels Fee as for her Buſineſs. When he came to execute it, it was not a place that he came to for that purpoſe, but upon quite another Affair: He would have put it off to another time, he would have avoided it, it was done in a hurry, and before Witneſſes prepared for that very occaſion, and brought from *Newcaſtle*-Houſe; and therefore it is not ſo much his Intent and firm laſt Purpoſe.

On the other hand they oppoſe this Argument thus, That the Duke did at the ſame time write to my Lord of *Bath*, that his Purpoſes toward him were unalterable; and what his meaning in that ſhould be, unleſs his purpoſe not to revoke this Deed and Settlement, truly I cannot tell, he left the Keys of all his Evidences with him when he went away, *Crofts* was ordered to deliver them to the Earl as chiefly concerned, if he ſhould miſcarry; he truſts him with the chief Management of his Affairs, directs him to be adviſed with upon all occaſions, as he uſed to do himſelf before, and ſo is the ſame ſtill towards him in all reſpects as ever he was.

I do not find in any of the Plaintiffs Proofs, that there is any Cauſe ſhown for altering this Mind of my Lord Duke's, if he had not himſelf declared it ſo, to be unalterable. There was no Provocation on the one ſide, or increaſe of Merit on the other ſide, why he ſhould change from his Kindneſs

neſs ſo grounded towards the neareſt Relation of his Blood, to entertain a Stranger, to whom he had never a thought of giving any thing before. It is hard to think that my Lord of *Bath*, Sir *Walter Clarges*, Mr. *Greenville*, and even the Dutcheſs her ſelf ſhould continue the ſame, and the Duke ſhould not; I find no Evidence of it, nor can tell any Reaſon for it; and without Reaſon I cannot be induced to give my Opinion againſt a Deed really, deliberately, intentionably made, upon only the ſingle Act of this Will, teſtifying ſo great and total a Change; ſurely if any ſuch thing had been meant, it was very ſtrange he ſhould take no notice of this ſolemn Will and Deed made before, and ask Advice whether it were not fit to revoke or look into it.

To my thinking the Duke hath in effect declared that this Will in 1687, ſhould be taken for a Will as obtain'd by Surprize; for he binds himſelf by this Proviſo only to revoke in ſuch and ſuch away to prevent Surprize. We then find there a Will that wants theſe Circumſtances required in the Proviſo, and then we muſt take it to be what he intended to fence himſelf againſt; and nothing doth reconcile the Duke to himſelf in this matter, but that he was apprehenſive he ſhould be drawn to do ſomething that was againſt his Mind; aad therefore he doth fence himſelf with this Proviſo againſt all ſuch Attempts.

The Will and the Deed do both provide largely for the Dutcheſs; but whether the Will doth it ſo liberally as the Deed doth, I cannot tell: they did talk as if there was 3 or 4000*l.* Difference; I cannot tell what, as to the Value it may be, but I am ſure in this Will there is no Proviſion made for my Lord of *Bath* at all, and there is none for Mr. *Monk* in the Deed, or any other thing before this laſt Will.

I muſt crave leave to differ from the Counſel for the Plaintiff, in what they take to be a Ground for a Revocation in Equity, that the Duke had forgotten this Deed; I am not ſatisfied that upon that Ground only this Court ſhould relieve againſt it: And my Reaſon is this; Suppoſe his Intention to revoke do appear, it ought to be in ſuch a manner as the Law requires, and purſuing ſuch Circumſtances as he has put upon himſelf, becauſe here is a voluntary Conveyance on both ſides; and where there are two voluntary Conveyances, he that hath the Advantage at Law ought to keep it. And ſo the Reſolution was in *Fry* and *Porter*'s Caſe; and I take it to be the ſtanding Rule in Equity: For what ſhall turn the Scale? ſhall the Defendant urge any thing of Merit? that cannot be in this Caſe; but in the Eye of Law they are both equal under the Conſideration of the Court, and *in pari gradu*: And indeed if it ſhould be otherwiſe, what would become of Circumſtances in Powers of Revocation? by which Men ſhackle and circumſcribe themſelves with very good Reaſon at their Creation, if the laſt Will alone ſhall ſet aſide all.

It is objected, that it was always the Duke's ſolemn Intent to prevent the diſhonourable Deſcent of his Eſtate upon his right Heir at Law, who ſprung from a Regicide, and to prevent a Surprize by a ſudden ſurreptitious Will, and both theſe Ends are attained by the ſolemn deliberate Preparation for his Will, and the Diſpoſition of the Eſtate to Mr. *Monk*; and it is ſubſtantially, and therefore equitably performed, though not ſtrictly legally.

I think there was a further End in this Deed, and that was to ſettle his Eſtate upon a Perſon of Honour nearly related to him in Blood: And this Court cannot take it from him without reflecting on this Settlement, and upon him that made it, and upon him for whom it was made. No, nor can it be done as I take it, without performing the Circumſtances required and preſcribed for that purpoſe in the Proviſo, without which I think this Court ought not to determine, that the Intent is performed, or that his Mind is changed. And if we ſhall depart from theſe Limits, I cannot tell where we ſhall ſtop: I can ſet this as a good Limit; here is a voluntary Conveyance on the one ſide, and a voluntary Conveyance on theother ſide; the latter Conveyance muſt make it out, that the Circumſtances requiſite are performed, and if not, I think the Law muſt decide it; and there hath been nothing made out, by which, as I conceive, there can be any Advance given in a Court of Equity to determine it otherwiſe than the Law will.

I ſhall ſpeak but very little to the other Head. It is objected and ask'd, whether there ſhould be no Relief in any Caſe where there is a Defect in the Execution of the Power; I think that would be very hard on the other ſide; and it would be convenient Relief ſhould be given in theſe Caſes.

Firſt, for a Purchaſer; I ſpeak not now of a Purchaſer for a valuable Conſideration without notice, for that is helped already by the Statute; and ſo where there is any Fraud, or the Party is guilty of any Deceit or Falſhood whereby a Man is prevented from executing his Power, though he never ſo much intended or deſired it.

But there is no ſuch thing here, and the Plaintiffs Counſel were wiſer Men than downright to call this *Fraud* only, they ſtile it Surprized Circumvention.

I think alſo it may be fit for this Court to give Relief where there is a foreign Conſideration; as Conſideration for Paiment of Debts, or providing for younger Children: As where a Man makes a Conveyance, or makes a Will, and chargeth his Lands over, which he has ſuch a Power, for Paiment of his Debts, and the Circumſtances of the Power are not exactly obſerved, there ſhall be Relief in Equity for the ſake of the Matter: Paiment of Debts is a moſt conſcientious thing, and fit for a Court of Conſcience to take care of, and ſee performed: And providing for Children is a thing of the ſame Nature; they are look'd upon as Creditors; and I think this is reaſonable, and the Precedents have all gone that way.

The Statute of 33 *Hen.* 8. which gives a Man Power to deviſe Lands by Will in Writing, recites it as reaſonable, that a Man ſhould diſpoſe of his Eſtate to pay his Debts, and provide for his Children, but goeth no further. Thoſe were wiſe and prudent Conſiderations upon which the Law did enlarge a Man's Power of diſpoſing of his Eſtate; but there is nothing of either of theſe in this Caſe; every one will ſay, he is not a Man of good Conſcience that will not pay his Debts, or provide for his Children: But will any Man ſay that my Lord Duke had not been a Man of good Conſcience if he had not given this Eſtate to Mr. *Monk*, or to my Lord of *Bath* either? He might lawfully and conſcientiouſly give it to the one or the other, but there is no Conſideration of Equity appearing why he ſhould be obliged

obliged to it, or to take it from the one to give it to the other; he might uſe his Liberty according circumſtantiated his own Power.

Another Ground of Relief in Equity is Accident, or an Impoſſibility of complying with the Circumſtances when he hath a plain Intention to do it: I agree it is ſo, but then he muſt do all that he can: As the Caſe that was put of a Man's being obliged to pay or tender Money at ſuch a Place, and he falls ſick or lame, or Bed-ridden, that he cannot go thither, and it is tendred by another by his Order, or at another Place; this being the Act of God, I think it would be a good Performance of the Condition; and that I think is the beſt Anſwer that can be given for the Decree in *Popham*'s Caſe.

But now here, when the Duke was informed of his Power, or might have been, and neglected all, and performed nothing; ſhall this Court ſupply theſe Neglects and Want of Performance? ſure they may as well ſupply all the reſt; that there ſhould be no Hand, no Seal, and for ought I know no Will or Deed, but only a Parole Declaration.

There is one thing that I ſhould properly mention laſt under this Head; they object it is not ſaid, That it ſhould be in the Preſence of ſix Witneſſes altogether. Now it was in the Preſence of three Witneſſes here in *England*, and three more in *Jamaica*: and ſo here are ſix Witneſſes, though not all at once, and there was no Peer to be had as a Witneſs in *Jamaica*: So there is an Accident rendring it impoſſible to have any ſuch, and therefore Equity will relieve againſt ſuch an Impoſſibility.

I do agree, if the Duke had gone about directly to make and publiſh his Will in *Jamaica*, with an Intention declared to revoke this Deed, and had had ſix Witneſſes to this his Act and plain Intention, there being no Peer to be had there, it ſhould have been a good Revocation: as in the Caſe mentioned by the Counſel of *Hibbett* and *Lee* in my Lord *Hobart* 312. Indeed if the Power were limited to be executed in the Preſence of three Subſidy-Men, it is ſaid in the Book, that they muſt be averred to be Subſidy-Men: But yet I take it now, that old way of Subſidies is out of uſe; three ſubſtantial Men that would have been Subſidy-Men, if that were the preſent way of taxing it, would be enough: For none ſuch would be had, nor could there be any Peer in this Caſe that is put.

But to conſider the Caſe and Proofs, as to *Jamaica*, what it amounts to, I would fain know how it appears that it was the ſame Will that he executed at Sir *Robert Clayton*'s; the Duke only ſaid, Doctor, this is my Will; perhaps it was the ſame, perhaps it was not: But how comes his writing his Hand and Sealing in the Preſence of three Witneſſes, and declaring it after to be his Will, (to make the moſt of it) in the Preſence of three more to be an Execution in the Preſence of ſix Witneſſes? But beyond all this, here is no Proof that he did intend to publiſh this as his Will, it is only a private Saying of his on the by, when he ſaw it among other Papers, which then he ſhewed to Dr. *Sloan*: He was not then ſolemnly making his Will, or executing his Power; he doth not ſo much as bid them take notice that he declared that to be his Will, or any thing to make them remember it afterwards. So that I take it, it ſignifieth nothing as to this Matter.

I would trouble your Lordſhip no longer, for I have been long enough already, I am loth to meddle with the Caſes and Precedents, becauſe that may take up too much of your time; but becauſe the Precedents have been brought me, I muſt ſay ſomething to them, to ſhew that I have read them, I will therefore open ſome of them, ſuch as I think come neareſt the Caſe.

They ſay the Common Law goeth as far in relieving, upon Caſes of Powers of Revocations, as appears by *Hibbett*'s and *Lee*'s Caſe, that I mentioned but now, where a Will is declared to be Writing. So the Caſe of *Thorne* and *Newman*'s Payment in another Place than that required in the Proviſo; in that Precedent it is recited, that the Indorſement on the back was, that the Money was paid according to the Proviſo, and no notice taken of the Place, for upon the very reading of the Indorſement the Plaintiff was forced to be non-ſuit: And afterwards that Matter was diſcloſed in Equity, that it was in another Place than the Place in the Proviſo, but yet no Relief againſt his own Acceptance, who was the Party privy.

The next Caſe is the Caſe of *Guy* and *Dormer*: a Man ſells his Eſtate with a Power to revoke by any Writing in expreſs Words.

Now here they did not help the want of a Performance, but the Judgment was, the Performance was real. Beſides, I cannot allow that to be any Argument, that if the Law has gone as far as it may, Equity ſhould go further. To me the Argument runs quite contrary, Equity ſhall carry it no further, for Equity ſhould follow the Law.

There were ſeveral Precedents cited by the Plaintiffs Counſel, but I confeſs upon Conſideration of them, very few do come up to the Caſe in queſtion. I ſhall take them as near as I can in order of time.

The firſt is that of *Prince* and *Green*, 40 *Eliz.* There was a Power to make Leaſes intended to be reſerved in a Conveyance by a Covenant to ſtand ſeized to Uſes, and a Leaſe is made accordingly, as a Proviſion for a younger Son. This Power was not long after *Mildmay*'s Caſe, and the Caſe in *Rolls*, *Abd.* 1 *part*, *lit*, *Charge* 378. But becauſe, ſays the Order, neither the Party nor his Counſel did then know, but ſuch Power was warranted by Law, though by late Judgments they were found to be void, and ſo it was impoſſible to them to prevent it, the Court did relieve in this Caſe to make good the Leaſe; and it is there ſaid that the elder Brother, who would avoid the Leaſe, was an unreaſonable Man; and this was a Proviſion for a younger Child: which is not our Caſe, either the Counſels Miſtake of the Law, nor a Proviſion for a younger Child.

The next is 44° *Eliz.* the Caſe of *Ferrers* and *Tanner*; A Man deviſeth Annuities out of Lands to his half-Siſters, and gives the Land to his half-Brother, who makes over his Eſtate to prevent their being ſeized of the Rent in order to diſtrein; and the Court after ſome time, and upon ſight of a Precedent, did relieve the Deviſees.

Here

Here I would obſerve how difficult it was even for this Court to do that: For they ſay, the Heir that had the Land did promiſe the Deviſor before his Death to perform the Will, and that was a Deceit, otherwiſe the Deviſor might before his Death have done it by a Conveyance, or granted the Land with a Condition to do ſuch an Act, or permit ſuch a Thing. And that he did conſent afterwards before the Maſter of *Chancery* to do it, I will not ſay but that this Court might have declared this Payment without theſe Circumſtances, nor that theſe might not make the Caſe ſomewhat better. Indeed in the ſhort Print of the Caſe in *Moor* 626. *pl.* 859. there is no Reaſon but the Reſolution only.

The next Caſe is in the Year 1655, the Caſe of *Hamilton* and *Maxwel* in this Court, which in ſhort was upon very good reaſon, becauſe it was a Proviſion for a younger Daughter, and that is urged on all hands to be a good Ground of Equity; and he declared that his elder Daughter was otherwiſe ſufficiently provided for.

Another Caſe is that of *Bowman* and *Tates*, and that is about a Covenant for levying a Fine for raiſing a Rent out of Lands, which was indeed defective at Law, but decreed in Equity to be paid and ſatisfied; but if it be look'd into, I think will not appear very pertinent to this Caſe, it being only to ſupport the Intention of an Agreement upon Marriage.

This was 12 *Car.* 2.

The next is the Caſe of *Wallis* and *Grimes*, 19 *Car.* 2. which was this; Sir *Thomas Grimes*, the Grand-father, makes a Conveyance in Truſt for Paiment of five hundred Pounds to younger Children; the Heir makes a Mortgage without notice, and this Truſt is endeavoured to be ſet up againſt the Mortgagee, but the Court would not permit it: But this comes not near our Caſe, for a Mortgagee is in nature of a Purchaſer.

Then 20 *Car.* 2. thence was *Pitt* and *Potham*'s Caſe in the Houſe of Lords.

There this Court did relieve, becauſe it was a plain Intent the Land ſhould be ſold, and there was only a want of naming the Perſon that ſhould ſell, and the Law would help that. He that hath the Land ſhall do that Office, and that was next door to a Proviſion for Children, it being for a

For the Caſe of *Smith* and *Aſhton*, beſides the Anſwer my Brother *Powell* gave to it, has alſo this flat Anſwer to be given, that it was a Proviſion for Children; that was the next Caſe in point of time.

Then comes the Caſe of *Briſco* and *Peters*, 28° *Car.* 2. I have as carefully as I can peruſed that Caſe, but cannot really obſerve how it is made uſe of in our Caſe. And it is very much to be conſidered that it is no Rule between two voluntary Conveyances, how far a voluntary Conveyance ſhall be fraudulent againſt a Purchaſer.

The next Caſe is that of *Thwaytes* and *Dey*, which hath alſo had a full Anſwer given to it already. It was doubted, whether it was a Seal to it; but the Court ſeemed ſatisfied with that, and all the remaining Queſtion was, Whether a Man making a Conveyance, and reſerving a Power to make any other Eſtate, could charge that Land with a Rent for a younger Child; and the Court held he might, and I think it a good Decree.

Theſe are the Precedents that are brought on the Plaintiffs ſide; there are but few brought on the Defendants part, but two that I think are very material: the one is that of *Ward* and *Booth*, which hath been opened and applyed by my Brother *Powell*; but I would obſerve from what he quoted out of the Decretal Order in that Caſe, that it doth very extraordinarily declare the Limits of this Court's Proceedings, in ſuch Caſes as theſe. Here was not a formal Revocation, but a clear and expreſs Intention to revoke. That doth not appear in the preſent Caſe. There ſhould be, I agree, Relief in ſuch Circumſtances if there were Fraud in the Party; if there had been any Accident to render it impoſſible, to execute the Power in all Formality. But here is neither Fraud nor Accident, and therefore by the Reaſons and Rules in that Caſe, there can be no Relief in this Caſe.

The other is *Arundel* and *Philpot*'s Caſe, and that is ſo very expreſs an Authority for this Court's leaving the Determination to Law, that nothing can be more. They there ſay, where it is a voluntary Conveyance againſt a voluntary Conveyance, you muſt try and decide the Matter at Law; and it did fall out in that Caſe, that there was no need of a Court of Equity to interpoſe; for upon the Trial it did fall out to be proved that there was a due and legal Execution of the Power, that there was a Tender of the Guinea.

As to the Matter of the General Truſt, I need ſay no more than this; whether that would avail any thing upon a Controverſy between the Legatees and my Lord of *Bath*, I cannot tell; but I am ſure it is not material at all as this Caſe now ſtands.

Yet methinks as to a General Truſt, that it cannot be; for that were to make the Duke uſe all this Solemnity in making this Settlement to no purpoſe, and would render this Power of Revocation very uſeleſs and idle. The uſe of this Power was, becauſe he had put the Eſtate out of him, both in Law and Equity, and ſo there could be no General Truſt or Means to bring it back again without a due Execution of the Power.

There are two or three ſmall Objections more that I ſhall but mention, and conclude.

Firſt, they ſay ſeveral Grants will be avoided if there be no Relief againſt this Deed. That is, ſome Leaſes, ſome ſmall Annuities to Servants, and a Grant of 100 *l.* to the Duke's Natural-Son: This is all. Now whether it is not reaſonable to imagine, the Duke thought that the truſting the Earl with ſo great a part of his Eſtate, he would have more Honour and Reſpect for him than to diſpute ſuch trivial Matters; and for any Leaſes

or

or Contracts, they come within the Rule of Purchaſes, and ſo the Conſideration would preſerve them.

Then they ſay, Here is no Monument for the Duke, a Perſon of ſo great Quality; but that may be made good out of the perſonal Eſtate. I am ſure it is no Objection in point of Law.

But the laſt Thing they urge is, If there be no Relief in this Caſe, you put the greateſt Indignity and Reproach upon the Duke that can be imagined. That he ſhould call Mr. *Monk* Couſin, ſend for him out of *Holland* to leave his Will with him, in the Will give him ſo great a Share of his Eſtate, deſire the King to make him a Baron, and appoint his Son to be educated as one that was to make no ſmall Figure in the World; that he ſhould ſend for my Lord Chief-Juſtice *Pollexfen* to draw this Will, make three parts of it; deliver one to the Dutcheſs of *Newcaſtle*, another to Colonel *Monk*, and carry a third with him into *Jamaica*, and there take publick notice of it; and after all this Expectation raiſed in Mr. *Monk* of a Fortune, run himſelf into the Charges of an expenſive, but what he knew would be a fruitleſs Suit. This ſay they, is an unconceivable Diſhonour to the Duke to be repreſented as one that would prevaricate ſo with the King and the World, and play with the Misfortunes of his Kinſman, and the rather becauſe the Duke was a plain ſincere hearted Man, and in all this did but purſue his real Intentions of Kindneſs to Mr. *Monk* and his Children.

Truly methinks they have juſt as much to ſay on the other ſide: What ſhall thoſe many Declarations of Kindneſs to the Earl before this Deed, in this Deed, and after this Deed, by Letters and other things, ſignify his Care of my Lord *Lanſdown*, as one he was moſt concerned next to my Lord of *Bath* himſelf, his Petitioning the King to confer on him the Title of Duke of *Albemarle* in caſe of his failing of Iſſue-Male, and all this to ſignify nothing beſides the known Kindred, the apparent Obligations and Merit of my Lord of *Bath*: ſure if all this be conſidered, the Duke's Honour is as much concerned on this ſide as on the other, to approve himſelf ſincere in all theſe Solemn Tranſactions. Would he own him as his neareſt Kinſman, and the moſt deſerving of his Blood, and all the while have a ſecret purpoſe in the laſt Act of his Life to make a Will, by which he would ſet aſide all he had profeſs'd to do for him, and by leaving this Deed and Will with him, leave only ſo much in his hands as ſhould put him into a chargeable Suit for nothing. Therefore upon the whole, I think there is greater reaſon to conclude, that the Duke did not certainly mean to do this laſt Act, as what he would have to ſtand againſt ſo much formerly done the other way. But I rather think the Evidence is ſtrong to perſwade any one that the making of this laſt Will, was to ſatisfie another purpoſe, and make his own Condition eaſie at home.

But my Opinion, as to the Judicial part of this Caſe, which I thus happen to be of, is the ſtronger in me, becauſe of the Authority of two Caſes, which I take to be expreſs in Point, and thoſe are the Caſes of *Wynne* and *Roberts*, and *Fry* and *Porter*.

In the Caſe of *Wynne* and *Roberts*, there was Proof of a very great ſurprize upon the Man, whereby he was induced to make a Will, and to diſ-

inherit

inherit his Child, of whom he was before very fond, and who was married into a very Honorable Family, and to break a Settlement ſolemnly made before; all this Matter was Charged in the Bill and proved: But notwithſtanding this, the Court declared they would give no Relief, but if they could expect any, they muſt go to Law; and at laſt it was ended only by a Bill in Parliament. The Court ſaid, Try it at Law, a Will or no Will, and do not expect the Chancery ſhould make Mens Wills, or ſet them aſide if legally made, eſpecially then not upon bare Conjectures and Suppoſitions concerning a Man's intentions to relieve againſt a Solemn Act and Title found at Law.

In *Fry* and *Porter*'s Caſe, one of the great Reaſons why the Court denied Relief there, was, that it was a Controverſy between two voluntary Conveyances; and there that Side that had the Advantage at Law, ought to keep it, and it was without Precedent to relieve in any ſuch Caſe.

So ſay I in this Caſe, we have no Precedent of Relief in any ſuch as this now before Us: We muſt not ſay this Court is unlimited, unbounded, by any Rules; it is no doubt limited by Precedents and Practices of former times, and it is dangerous to extend its Authority further; If therefore I err in my Opinion in this Caſe, I err with theſe Precedents on my Side; and becauſe I have never an one to guide me the other way, the Defendants are in Poſſeſſion of a Verdict, Judgment and Title at Law, and I can ſee no ground of Equity to relieve the Plaintiffs againſt them.

Then it being very late, the Court put off the delivering of the Lord Chief Juſtice *Holt*'s Opinion, and the Lord Keeper's Decree till another Day.

Die

Die Veneris 23 Decemb. 1693.

In the Court of Chancery in *Weſtminſter*-Hall,

Com. Mountague & al. adv. Com. Bathon. & al. & e contra.

Lord-Chief-Juſtice HOLT.

IN this Caſe, wherein the Earl of *Mountague* and the Dutcheſs of *Albemarle* and others are Plaintiffs, and my Lord of *Bath* and others Defendants, I ſhall open the Caſe very ſhortly, as it ſtands upon the two Wills, and upon the Deeds.

There was a Will made in the Year 1675, by *Chriſtopher* Duke of *Albemarle*, wherein there is a Diſpoſition of ſeveral parts of his Eſtate upon his dying without Iſſue, to ſeveral Perſons; but the main Part and Bulk of it is given to my Lord of *Bath*: And in that Will there is mention made of a particular Eſteem and Affection which the Duke bare to my Lord of *Bath*, that he was the neareſt of his Kinſmen by his Father's ſide; and that he alſo was indebted to him for many great Acts of Friendſhip and Offices of Kindneſs performed to him and his Father. Then there is in that Will alſo an expreſs Deſire that the Title of Duke of *Albemarle*, by the King's Favour, might be conferred upon the Earl of *Bath*; and that the eldeſt Son of the Earl of *Bath*, and ſo the eldeſt Son of the Family ſucceſſively, ſhould be called Lord *Monk*; ſo that the Names of *Albemarle* and *Monk* may with the King's Favour, remain with his Eſtate in the Poſterity and Family of my Lord of *Bath*, in memory of the late Duke his Father and himſelf.

The Eſtate being ſo diſpoſed of by the Will of 75, there are two Deeds made in the Year 1681, a Leaſe and a Releaſe. The Releaſe doth recite this Will, but in the Recital of it there are ſome Differences from what is in the Will it ſelf, ſome Variations from it. In this Deed it is mentioned that the Intent and Deſign of the Deed was to diſpoſe of the Eſtate according as was in the Will: And whereas it might be thought ſtrange that the Duke by his laſt Will, which by that Deed he doth confirm and not intend to revoke, ſhould give away his Eſtate from the Heir at Law: Therefore for the ſatisfaction of the World, the Duke doth declare the Reaſon which hath been frequently mentioned; and then the Deed diſpoſeth of the Eſtate ſome to the *Greenvills*, ſome to the *Clarges*; but the Main and Bulk of the Eſtate he ſettled upon my Lord of *Bath*. But in this Deed there is a Power of Revocation to this effect, That it ſhall be lawful for the Duke at any time to revoke this Deed upon the tender of a Shilling, by writing under Hand and Seal in the preſence of ſix Witneſſes, whereof three to be Peers of the Realm, and then to limit new Uſes.

Then he makes his Will in the Year 1687, and therein he gives his Eſtate in a different manner; that is, the bulk and the main of it is given, inſtead of my Lord of *Bath*, to Mr. *Monk*, whom he ſuppoſeth to be his Kinſman, and deſires that the Name and Title of Baron *Monk* may,

by the King's Favour be beſtowed upon him, in caſe he himſelf died without Iſſue.

Now the Queſtion is, whether or no this Will in 87 hath revoked this Deed made in 81 in Equity, for there are but three Witneſſes to this Will, and not one of them a Peer, ſo that in Law it is very plain it is no Revocation at all; it cannot be a good Revocation there, becauſe the Power is not purſued, the Circumſtances are not obſerved; here is neither the tender of a Shilling, nor ſix Witneſſes, whereof three Peers, nay not only ſo; but here are but three Witneſſes in all, and not one of them a Peer.

I am of the ſame Opinion with my Lord Chief Juſtice of the Common Pleas, and my Brother *Powell*, that this is no Revocation in Equity, and that there ought to be no relief had by the Deviſes of the Will of 87, againſt thoſe that Claim by the Deed of 1681.

Theſe things are to be premiſed as granted, and not to be queſtioned.

Firſt, That the VVill of 75 was a good VVill, there is no manner of diſpute to be made of that.

Secondly, This Deed of Releaſe that was made in 1681, is a very good Deed, and there is no manner of diſpute to be made of that neither; for if there had not been a Verdict in the Caſe, yet if they come to have the Opinion of a Court of Equity, touching Relief in Equity againſt this Deed, it ought to be taken to be a good Deed in Law, or they were not to come hither for Relief againſt it. And as this Deed is to be admitted to be a good Deed, ſo in this Debate all thoſe Circumſtances that appear in the Depoſitions are to be admitted to be true in this Cauſe. I do not ſay that they are never hereafter to be controverted, but now upon this Debate they are to be admitted true. As

Firſt, That Sir *William Jones* his Hand is to the Peruſal and Approbation of the Proviſo, and it is his VVriting.

Secondly, That he was a VVitneſs to the Execution of this Deed. And

Thirdly, That this is true which *Errington* ſwears about the Abſtract of this Deed made by Sir *Thomas Stringer*, which being main Circumſtances about the Deed, and Controverted, now muſt be taken for true in the Conſideration of this Cauſe. And then a third thing that is to be admitted without all Contradiction too, is, that this VVill of 87 is a good VVill.

The Caſe ſtanding thus, and all theſe things being taken for granted, the Queſtion I ſay will be, VVhether thoſe that Claim by this VVill of 87, can have any Relief againſt thoſe that Claim by the Deed of 81? And I think there ought to be no Relief, but thoſe that Claim by the Deed of 81, have a good Title in Equity as well as in Law.

I ſhall not mention any thing of the Evidence that hath been given, or inſiſted upon to ſupport the Deed, nor now anſwer any of the Objections made againſt the Truth of it; for I told you firſt, I take it for granted, that it is a good Deed, and a true Deed without all diſpute. But to the intent I may comprehend all the Matters that I think are any way conſiderable, and fit to be inſiſted upon, I ſhall ſpeak to four general Heads.

Firſt,

First, I ſhall conſider whether upon the Frame and Manner of this Deed of 81, there be any ground of Relief for the Plaintiffs againſt it.

Secondly, VVhether there appears upon the Proofs and Depoſitions in this Cauſe, that there was any undue way or manner of Obtaining this Deed from the Duke: Or any Way, or Contrivance, or Management for the Contriving it in being afterwards, which may produce a ground of Equity for the advantage of the Plaintiffs.

Thirdly, I ſhall conſider the Circumſtances and Conditions of the Parties that are in this Cauſe, thoſe that Claim by the Deed of 81, and thoſe that Claim by the VVill of 87, and whether upon that account there can be any Equity raiſed in this Cauſe. And

Fourthly, I ſhall conſider the Perſon of the Duke of *Albemarle*, and the particular Circumſtances he was under at the time of making this VVill in 87; and whether by reaſon of him from whom the Eſtate proceeds, or the Circumſtances he was under, there will appear any ground of Equity in this Caſe.

The firſt Conſideration I ſay ſhall be, whether upon the Frame and Manner of this Deed there be any ground of Equity for the Plaintiffs againſt it. There were ſeveral things under this Head that were inſiſted upon by the Counſel for the Plaintiff. As

Firſt, That this Deed of 81 doth partake of the Nature of a VVill becauſe it recites a VVill, and it is made to confirm a VVill, and therefore ſhall be Revocable in a Court of Equity as a Will ſhall be in a Court of Law.

Secondly, That it pretends to Recite the Will of 75, and there are ſeveral Miſtakes in the Recital, and very great Variations from it.

Thirdly, That there are ſeveral Diſpoſitions different from thoſe in the Will, which it pretends to confirm.

Now for the firſt, To maintain that when a Deed recites a Will, and doth ſay it ſelf is made to confirm that Will; therefore this Deed ſhall be Revocable in its Nature in Equity, as a Will is at Law, I muſt needs ſay, is a Motion that I never heard ſtarted before, I muſt confeſs I am apt to think

with the Proceedings and Practice in Courts of Equity, that may make it ſo ſtrange to me, it having been laboured with no ſmall apprehended Clearneſs at the Bar. Therefore for that I muſt Appeal to you, who are conſtant Practicers and Attendants here, Whether it be not a Notion altogether New. And to me as it is a New Notion, ſo it is very fine, and ſeems impoſſible to be ſupported by any Reaſon, but muſt produce very ſtrange Abſurdities. It is not to me to be reconciled with any Reaſon of Law or Equity, as far as I underſtand any thing of either.

For

For to ſay that a Deed is revocable, becauſe it relates to a Will, is firſt to contradict the Nature and Eſſence of a Deed. For a Deed takes effect immediately upon the ſealing and delivery, and is impoſſible to be altered from what it is and has in it, or to be revoked by him that made it. But becauſe it relates to a Will, it ſhall be revocable as a Will is; That I ſay is a meer fine-ſpun ſtrange Notion, not at all agreeable to Reaſon.

Next ſuch a Conſtruction and Strain as this in Equity muſt overthrow the Intention and Deſign of him that made the Deed. For when a Man has made a Will, which is not conſummate till his death, and after that makes a Deed, and limits the Eſtate in ſuch a manner as it was diſpoſed of by the Will: What doth this Man mean, but that thoſe Eſtates which were or ariſe by the Will upon his deceaſe, ſhall have immediate Effect during his Life? And whereas he thought with himſelf it might not be ſo convenient to leave his Eſtate wholly to depend upon a Will which might ſo eaſily be altered, it was his Mind and Intention that it ſhould be made more firm by a Deed which is more permanent.

Next it is a mighty Strain to make a Deed revocable as a Will; for then you muſt firſt ſet up again that Will which was thereby revoked, for you cannot imagine, but that when a Deed is made though to confirm a Will, the Eſtate limited thereby doth ariſe by the Deed, and the Will is revoked by the Deed. So you ſet up a Will that is no Will in Law, and that ſhall controul a ſubſequent Deed which deſtroyed that very Will, which is ſtrange, and contrary to all Rules of Law and Reaſon.

There were ſome Caſes quoted wherein a Deed ſhall controul a Will, as *Dyer* 49. It is ſaid, If a Man makes a Feoffment to the uſe of his Will, which was next at that time to the Charter of Feoffment, that that Will is revocable, notwithſtanding there is an expreſs Application in the Deed to that Will it ſelf, and ſo the Uſes ariſe by the Deed, not by the Will; and yet though this Deed hath relation to the Will, that Will may be revoked.

This indeed hath the Terms put in this Caſe, but in Reaſon is no way applicable to it. When a Man makes a Feoffment, and annexes his Will thereto, there the Deſign is, that the Eſtate ſhould ariſe, not immediately upon the Feoffment, but attend upon the Will. But if a Man make a Deed of Feoffment, and ſays it ſhall be to the uſe of ſuch Perſons, and for ſuch Eſtates as in his Will, or as he ſhall give according to the Will, there though the Will doth mention the Names, and limit the Eſtates, the Uſes do not ariſe by the Will but by the Deed: For though the Will be no part of the Deed, yet when the Deed doth refer to the Will, and the Will hath limited the Eſtate, it is as much as if all the Limitations had been comprized in the Deed.

And I take it that Deed is not revocable, becauſe it hath an immediate Effect, and can be no otherwiſe revoked but according to a Power reſerved in the Deed it ſelf. And that is *Huſſey*'s Caſe, *Moor* 756. A Man makes a Will, and he makes a Feoffment to the Uſes mentioned in the Will, tho the Will be revoked, as ſure it is, yet it is a ſufficient declaration of the Uſes.

It was further urged for the ſupport of this Notion, what is ſaid in *Hobart* in the Earl of *Ormond*'s Caſe. The Caſe is put a little ſhort in the Book. A Man ſuffers a common Recovery to the uſe of ſuch Perſon and Perſons, and

and for ſuch Eſtate and Eſtates as he ſhould diſpoſe of and to in his laſt Will. This was a Caſe in *Ireland*, and before the Statute of Uſes was made there; and ſo we muſt look upon it in *England* as a Caſe before the 27 *H.* 8. and then there being a Feoffment made, he remains *Ceſtuy que uſe in Fee* in the mean time, for he hath a Power by Will to diſpoſe of the Uſe, according as is expreſſed in the Deed. Then he makes a Deed in his Life-time, and giveth away the Inheritance of this Uſe, and afterwards makes his Will. Now here is a Deed that giveth the Inheritance of the Uſe away; and here is a Will that doth controul and alter the Diſpoſition of this Deed. This was the uſe that was made of this Caſe.

Now in anſwer to that, Suppoſe it were ſo, this Will is but an execution of that Power which proceeds from the Deed; for when a Man makes a Feoffment for the uſe of ſuch Perſons, and for ſuch Eſtates as he ſhall limit by his Will. It is not the Efficacy of the Will that diſpoſeth of the Eſtate, but it is by virtue of the Deed; ſo that the Deed in his Life-time was no execution of the Power reſerved in the firſt Deed, which was only to do it by a Will.

But I muſt ſay this further to that Caſe of the Earl of *Ormond*, That I do not take that Opinion of the two Judges, *Hobart* and *Dodderidge* there delivered to be Law; and there were other two Judges, *Mountague* and *Hutton* that were of another Opinion, and others were of their Mind, and it did not come to a judicial Reſolution. And my Opinion is this, That if a Man made ſuch a Feoffment before or after the Statute of Uſes, he hath the Fee Simple of the uſe veſted in him in the mean Time, and therefore hath a Power to diſpoſe it. And if he doth by Deed in his Life-time diſpoſe of it, that is a good Diſpoſition, and the Will ſhall not controul it, for he is as much Maſter of the whole Eſtate, both before and ſince the Statute of Uſes, as if he had made a Feoffment in Fee to the uſe of himſelf; And then an abſolute diſpoſition of this by Deed doth extinguiſh and deſtroy the Power. If he from whom the Eſtate moved doth reſerve a Power in any particular manner to limit any Eſtate or Eſtates by his Will, the whole Fee-ſimple is in him, and any Act he doth do to diſpoſe of the Eſtate, will hinder him from executing of that Power.

And for this I ſhall quote you but one Caſe, and that is in *Lea* 39. *Broad's* Caſe; a Fine is levied to the uſe of ſuch Perſons, and for ſuch Eſtates as the ſhould limit and appoint by his laſt Will, and ſo the Caſe comes home to this Caſe. He after this covenants to ſtand ſeized of theſe Lands to the uſe of his ſecond Son and his Heirs, and then makes his Will, and diſpoſeth of the Eſtate therein according to the Power. The Queſtion was, which of theſe Diſpoſitions ſhould take place, the Deed or the Will? The Will was according to the Power reſerved upon the firſt Fine, and the Deed intervened before he came to execute this Power; It was there held that having made a Diſpoſition of the Eſtate by Deed, though by a Covenant to ſtand ſeized, that ſhould take effect, and the Will, though made according to the Power, came too late to execute it. So that I think none of theſe Caſes that have been mentioned for this purpoſe are applicable to the Caſe in Queſti-

on, nor argue or prove any thing material for that which the Plaintiffs Counſel intended them for.

Ay but ſay they, this Will of 1675, and Deed of 1681, make but one Conveyance, and then the Will that is the Principal that ſhall govern all the reſt. Now this is a Notion fetch'd from the Courts of Law, but very improperly applied to this Caſe as I think: For this Will being revoked by this Deed, is no Conveyance at all. Where ſeveral Acts make but one Conveyance, every one has its diſtinct operation to carry on the main Deſign. As a Leaſe and Releaſe, the Leaſe conveys the Poſſeſſion for Years, the Releaſe conveys the Inheritance to the Poſſeſſion by way of Enlargement. So a Fine and Recovery, and Deed to declare the Uſes, make but one Conveyance, but each performs its particular Part: The Fine conveys the Freehold to one Man, and upon the Recovery it is conveyed to Another, and upon the Limitation of the Uſe it is conveyed to a Third; all are preparatory Acts neceſſary to compleat the Conveyance of the Inheritance whither it was at firſt deſigned.

But how will they make a Will that hath no ſubſiſtence to be one Conveyance, with a Deed that before deſtroyed that Will? I cannot ſee how, nor is it reconcileable with Law or Reaſon. So that for that Matter, I think they have no ground to inſiſt upon this Point, that this being a Deed relating to a Will, may be revocable in Equity as a Will is at Law.

But to go on to the next.

This Deed doth ſay, It was made and intended to confirm the Will, and yet makes ſeveral Recitals and Limitations contrary to it.

Why, ſuppoſe it were that it did recite the Will truly, and ſays the Will diſpoſed of the Eſtate ſo and ſo; and then adds, that it was made to confirm the Will, but yet diſpoſeth of the Eſtate quite otherwiſe than the Will doth, ſhall this avoid the Deed in Equity, or make it to have another conſideration than it elſe would have? The reciting part of a Deed is not at all a neceſſary part, either in Law or Equity. It may be made uſe of to explain a doubt of the Intention and Meaning of the Parties, but it hath no Effect or Operation. But when it comes to limit the Eſtate, there the Deed is to have its effect according to what Limitations are therein ſet forth. And that is plain and full, without any manner of Contradiction whatſoever.

Now becauſe a Deed is repugnant in ſome part, that is material to what is immaterial, Is that any ground in Equity to ſet aſide this Deed? or make it more liable to a Revocation than if they had been conſiſtent? that ſeems ſtrange. Then here are Miſrecitals and Miſtakes, which I take to be Miſtakes of the Clerk; and ſhall theſe Miſrecitalls of the Will in the Deed deſtroy the Effect of the Deed, when the Meaning and Intention of the Parties is moſt manifeſt and clear how the Eſtate ſhall go, and there is no Reference in the Limitations of the Deed to the Will, but only in the Recitals, and there there are Miſtakes. Now if the Limitations of the Will and Deed are not applied to the Recitals in the

Deed,

Deed, then thoſe Miſrecitals cannot hurt the Limitations in the Deed. If ſo be the Limitations in the Deed had been general to ſuch Uſes as were before Recited to have been limited in the Will, then there had been ſome ground to infer that theſe Miſtakes ſhould be a foundation for Equity, to rectify thoſe Miſtakes. For that ſuppoſeth the Recitals in the Deed concerning the diſpenſation of the Eſtate by the Will are right, and would come too late at the time of the Limitations to rectify them, and that were a Miſtake, that might be a good ground in Equity to relieve againſt the Miſtake.

But when it comes only by way of Recital to be diſpoſed by the Will one way, and then doth in expreſs words limit it a contrary Way, the Intention is plain that it ſhould go according to the Limitations in the Deed; and there can be no Foundations in Equity to ſet it aſide. The Rule of Law is, *Benignæ ſunt Interpretationes Chartarum.* And I ſuppoſe there ought to be a great deal more indulgent interpretation of them in Equity, to maintain the Intention of Parties. So that as to that firſt Point concerning the Frame and Manner of this Deed, and the Contradictions to and Miſrecitals of the Will in it, there is no Foundation of Equity to relieve the Plaintiff againſt the Deed, unleſs the Power of Revocation in the Deed were legally purſued.

The next thing is, VVhether there be any thing proved in the manner of obtaining it from the Duke, or managing and continuing of it after it was obtained, be any Foundation for Equity to relieve againſt it? And for my part I ſee none.

Firſt, I do not ſee any manner of Evidence to prove any indirect Practice for the obtaining of this Deed from Duke *Chriſtopher*. The moſt that can be made of it is but bare ſuſpicion, and indeed that a very ſlender one too.

But ſay they, can you prove the Duke ever read it, or had it read to him? That is a ſtrange Objection, when it is proved to before Witneſſes, and ſo many; ſure that is but a ſlender ground of Equity, the not reading of it? But nothing of Surprize, or Ignorance in the Duke of what he did in it ought to be ſuppoſed, becauſe Sir *William Jones*, who is proved to be the Duke's Counſel, was by, and a Witneſs to it. I told you at firſt Sir *William Jones*'s Hand to be to the draught and Deed muſt be admitted, becauſe I take it for granted that this is at Law a good Deed. And if I did not take it for granted that that was Sir *William Jones*'s Hand, and he was a Witneſs to the Deed, I ſhould not take it for a good Deed. But I meddle not with the point of Fact, but take the Fact to be granted to bring the Judicial point in Queſtion, ſo that it is his Hand, and he is a VVitneſs to this Deed.

Then *Secondly*, It muſt be imagined that when Duke *Chriſtopher* made this Deed, he did it with ſome Deſign and for ſome purpoſe or other, and if ſo, you cannot imagine that the Duke was at all ſurprized therein, but that when it was executed it was according to that deſign and purpoſe.

Next Sir *Thomas Stringer*, who was the Duke's Counſel to Peruſe and amend the Draught,- as appears by his own Hand, ſworn by his Son, and his Man. To imagine then that a Man ſhould be ſurprized into the making of a Deed, when his own conſtant Counſel doth Peruſe and Amend the Draught, and the Counſel he uſed particularly to adviſe with, is by at the Execution, and a Witneſs to it; is to ſay, a Man was ſurprized when he had the Advice of Counſel about it, and they were at his Elbow at the Executing of it.

Now I muſt confeſs I am to ſeek, and do not well know what is a Fraud in Equity, that ſhall avoid a Deed, which is a good Deed at Law. The Caſe of *Bodmin*, and *Wynne*, and *Roberts*, mentioned by my Lord Chief Juſtice, and my Bother *Powell*, that ſpake the laſt day this Cauſe came on, is I think a Caſe of great Authority in a Court of Equity, becauſe it had a great Tranſaction both in this Court, and in the Houſe of Lords, before it came to a Reſolution and Reſult. I ſhall put the Caſe in ſhort as it was here in Court.

Mr. *Roberts*, Son to the late Earl of *Radnor*, married the Daughter of Mr. *Bodmin*. *Bodmin* had made a Will, and given his Lands to the Children of his Daughter in Tail, and after this he makes another Will, whereby he gave one part of that Eſtate to Mr. *Wynne*, and another part to a remote Kinſman. It did moſt plainly appear in the Depoſitions of this Caſe, that this Will was obtained by great Fraud and Circumvention; that is, *Wynne* got into his Acquaintance by pretences of ſome little Offices of Friendſhip and Kindneſs, he got him away from his Friends and Relations, and during his Sickneſs he did by falſe Stories withdraw his Affection from his Daughter, kept him in ſecret Places, that no Friend might come at him; and while he was ſo ſecreted and wrought upon, was this laſt Will made, whereby he gave his Eſtate away from his Child to a Stranger. All theſe pieces of Practice were Apparent before the Court at the Hearing of this Cauſe, which was heard by my Lord *Clarendon*, Aſſiſted by

who all Unanimouſly Declared, that this was a VVill obtained by Fraud and by Practice, and that there was great Reaſon, if they could, to relieve againſt it. But they ſearched Precedents, and could find none that would come up to the Caſe. Thereupon for difficulty there was Advice taken about it in the Houſe of Lords; and there upon Conſideration was an Order made by way of Advice to the Lord Chancellor, that he ſhould proceed to do Juſtice to either Party, though there were no Precedent found to govern the Judgment. Afterwards this Cauſe came to be heard again, 12 *June* 1666, when my Lord Chancellor being aſſiſted by my Lord Chief Juſtice *Bridgman*, my Lord Chief Baron *Hales*, and Mr. Juſtice *Raynsford*, did declare, That there could be no Relief, though it was ſaid before it was apparently a VVill obtained by Fraud, and this to the Prejudice of the Heir at Law, who had never Offended, or given him any Cauſe to Diſinherit her. So the VVill was diſmiſſed, but the Parties complaining in Parliament, were Relieved by the Legiſlative Power by an Act of Parliament.

Now

Now, beſides that, there was Evidence of ill practice in that Caſe, but in this, I ſay, I find none; this is ſo great an Authority, and does ſhew the wariness of a Court of Equity, that I think none can be greater: Equity would not relieve them, but they were put to ſeek their Relief by a Law made on purpoſe.

But I will ſuppoſe now in this Caſe, that when my Lord of *Bath* did underſtand the Kindneſs of Duke *Chriſtopher*, and knew of the Will of 75. and knowing the Inconſtancy of the Duke's Temper, and other Circumſtances in the Family, and the Revocableneſs of a Will, ſhould have applied himſelf to the Duke, and told him, 'It is true, you have been ſo kind, as by your Will to bequeath 'me a great part of your Eſtate, but you may be prevailed with on a ſudden, or 'by ſome Artifice or other, to alter this Will of yours; and you may be ſur-'priz'd into the doing of it; pray will you make a more ſolemn Settlement to 'confirm this Kindneſs by a Deed: And had prevailed to get him to do it. Suppoſe, I ſay, he had done ſo, tho I find no Evidence in this Caſe of any ſuch thing; ſuppoſe he had been employed in the whole tranſaction of ſuch a Deed, is this unlawful? or, is it any harm? No, it is very innocent, he might lawfully do it; and if he had opportunity, he might prudently do it. But, I ſay, I find not ſo much as that in this Caſe, but this Deed was fairly obtained from the Duke; whether it was by the advice, deſire, or interpoſition of my Lord of *Bath*, doth not appear; or whether it were the Duke's own voluntary Act, though I think it is not material, whether it was the one or the other.

But it hath been ſaid, That when Duke *Chriſtopher* did deſign to alter his Will, and for that purpoſe ſent to my Lord of *Bath*, to bring the Will of 75. which he had in his Cuſtody, my Lord of *Bath* ſhould have told him of this Deed too: And therefore the concealing of the Deed of 81. from D. *Chriſtopher*, is a kind of fraud; and not making a diſcovery of it then, he ſhall not now take advantage of this Slip, and have the Eſtate by this Deed; becauſe if the Duke had conſidered the *Proviſo* in the Deed, he would have taken effectual care to have had a good Revocation in all the Circumſtances: And, that he did not ſo revoke it, muſt be imputed to the concealment of this Deed from the Duke, by the E. of *Bath*.

So was the Caſe of Mr. *Clare*, at the Suit of the E. of *Bedford*, which was opened the laſt Term. A Man that ſtands by and ſees a Cheat, which might have been prevented by his diſcovery, ſhall not take advantage of his own wrong and profit by ſuch concealment. But doth it appear in this Caſe, that my Lord of *Bath* knew to what purpoſe the Duke ſent for his Will; or how or in what manner he would alter the Settlement of his Eſtate? Why muſt he be bound to take more notice of this Deed to the *Duke* than the *Duke* himſelf? It was the *Duke*'s own Act, and not my Lord of *Bath*'s, and why ſhould he give him notice of his own Act?

The Rule of Law, when one is obliged to give notice to another, is this: When the thing lieth more in the Knowledg of the one than the other, and he cannot come to the Knowledg but by his means: But when one Man hath reaſon to know and doth as much as the other, he is not bound to give notice to that other.

Beſides, it doth not appear, as I remember, (for it is ſome time ſince this Cauſe was heard) that my Lord of *Bath* did know to what purpoſe the *Duke* did call for his Will, and that the Deed and Will were both in the cuſtody of the *Duke*; for though at the time of the execution of the Deed it was delivered to my Lord of *Bath*, yet that was only for the due execution as a Deed; for my Lord in his Anſwer ſaith, He knoweth not where it was afterwards, till delivered to him by the *Duke* with the Will, under one Cover, ſome ſhort time before he went abroad. And ſo there is great Reaſon to induce the Belief, that it was in the *Duke*'s own cuſtody.

Then as to the Objection of *Secrecy*, it is kept ſecret all-along, and no body can give any account of this Deed. Take it for granted it was ſo; Shall a Set-

tlement in a Family (where the nature of the thing requires Secrecy) becauſe it is kept ſecret, be ſet aſide in Equity? It ought to be kept ſecret, and that is no Objection at all; Perſons do not uſually intend that all the World ſhould know how their Eſtates are ſetled.

But ſay you, At leaſt here is a general Preſumption, take all together, upon the Circumſtances of the whole Caſe, that there was ſome kind of management in concealing of this Deed. Now, in a *Court of Equity* ſhall Preſumption be ſufficient to found a Decree upon? If that ſhall avail in a *Court of Equity*, it is an eaſie matter, according to the Judges Faith, to preſume a Man out of his Eſtate. There are Preſumptions of ſeveral ſorts, ſome are violent, and ſome probable: A violent Preſumption, That ſuch a Man hath done ſuch a Fact, muſt be when a Fact is done, and no other can be thought of to have done it: As, if a Man be killed in a Room, and another Man comes out of the Room with a Sword bloody in his Hand, and no body elſe was in the Room. Here is a plain Fact done, and tho no body can ſwear they ſaw this Man do the Fact, that he killed him, yet from this Evidence there is a very ſtrong Proof.

But a probable Preſumption alone is no Proof to rely upon; where indeed there is ſome Proof of Witneſſes poſitive, and the Preſumption is probable that is added thereto, it may be a good fortifying Evidence, but it ſignifies very little of itſelf for a Foundation.

So that I think here is no Proof or Evidence, That my Lord of *Bath* did ſurprize the *Duke*; or, that the *Duke* was ſurprized in this matter; or, that there was any indirect means uſed to conceal it from the *Duke*. And ſo I have done with the Second Head that I at firſt propoſed. Therefore,

Thirdly, I come to conſider the Perſons that are concerned in this Cauſe, that is, thoſe that Claim by the Deed of 81. and thoſe that Claim by the Will of 87. Thoſe that Claim by the Deed of 81. are Relations of Duke *Chriſtopher* without all queſtion: My Lord of *Bath*, that is entituled to the greateſt part of this Eſtate, is a very near Relation, and a Perſon that had done many Kindneſſes for the Family, had been conſtantly aſſiſtant to the *Duke* in his buſineſs: And the others are near Relations too.

Then for thoſe that Claim by the Will of 87. Mr. *Monk*, that claims the main of the Eſtate, is indeed in the Will called Couſin; but it is plain (if at all) he is not ſo nearly related: So that when in reſpect of the Perſons that claim by contrary voluntary Settlements, there is even an equality of Relation, and no difference of Conſideration, (much more when there is an inequality) he that hath the beſt Title at Law, muſt carry the Eſtate: For what is it that makes the Difference, but the difference of the Conſideration? As in the Caſe of a Deed in conſideration of Blood, and an After-deed to a Purchaſer, for a valuable Conſideration; the Laſt ſhall take place, as the Beſt Conſideration.

But for revoking, or voluntary Settlement, in favour of a ſubſequent one, where there is no difference between the Parties as to the Conſideration, I think hath no ground in Reaſon. There is as much Equity for the one as the other. It is perfectly at large, and I take it to be a conſtant Rule, that where one Party hath more Equity than the other, the Law muſt take place, and that in this Caſe being manifeſtly for my Lord of *Bath*, by this Verdict Equity ought not to take it from him.

This Principal was the Foundation of the Decree in that Caſe of *Smith* and *Aſhton*, that has been likewiſe mentioned and urged before: There was a Power under Hand and Seal to be atteſted by three Witneſſes, and to charge with Portions for younger Children; ſo it is a limited Power: Then he makes a Revocation for Advantage of younger Children, but not exactly purſuant to the Circumſtances of the Power. This was held good in Equity, and all the reaſon in the world it ſhould, becauſe a Man is obliged to provide for his younger Children;

and

and it is againſt all Juſtice and Reaſon to make ſuch a Settlement upon the Eldeſt Son, as to ſend all the other Children a begging, being under the ſame natural Obligation to provide for the one as the other. Therefore, becauſe of that Natural Obligation, Equity hath been indulgent to ſupport ſuch Proviſions, becauſe the firſt Settlement that diſabled him from it, was wrongful and injurious, and contrary to all Equity, and then in ſuch Caſe Equity is very indulgent.

But I would put this Caſe: A Man ſettles all his Eſtate upon his Younger Son for Life, with a Power to revoke by Deed, ſealed in the preſence of three Witneſſes; without more ado he makes his Will, and diſpoſeth of his Eſtate to his Eldeſt Son wholly, and that Will is atteſted as (put it) before the Statute by two Witneſſes, Is this a good Revocation in Equity? I ſay no: For the one is as nearly Related to the Father as the other; the Conſiderations are equal, the one is as much a Son as the other, and therefore there is no great difference between them; and the Younger Son, who hath the Eſtate by Law, ſhall enjoy it, tho afterwards it return back to him that was the Eldeſt.

The Fourth and Laſt Point is this, Whether in reſpect of Duke *Chriſtopher*, and thoſe Circumſtances that attended him, there be any Reaſon to relieve againſt this Deed in Equity. And here,

Firſt, It is ſaid, if a Man makes a Feofment, with a Power of Revocation, under ſuch Circumſtances, and doth make a Revocation, where all the Circumſtances are not obſerved, he is ſuch an Owner ſtill of the Eſtate, as that Equity ſhall ſupport the diſpoſition.

I ſay no: For that is to ſet up Equity in direct Oppoſition to the Law. For when a Man hath reſtrained himſelf by a particular Power, and hath no Legal Right to diſpoſe of this Eſtate, but by exactly purſuing that Power, Equity cannot enlarge that Right or Power.

Legally you agree he cannot; for if he could, then were there no Reaſon for imploring the Aid of a Court of Equity: and there is the greateſt Reaſon he ſhould be obliged by the Rule of Law in a Court of Equity, becauſe it is a Law that he hath put upon himſelf: And that is the Equity of the Legal Obligation, becauſe it is ſuppoſed to be made by his own expreſs or implyed Conſent, by his Repreſentative to all Laws. Here is a Man that hath made a Deed, whereby he has actually reſtrained himſelf from diſpoſing of his Eſtate, but in ſuch or ſuch a way. By the ſame Reaſon, that you in a Court of Equity will conſtrue it a good Execution of the Power, where the Circumſtances are not ſtrictly obſerved, you may allow a Man to revoke a voluntary Settlement, when there is no Power reſerved to him in the Deed ſo to do: And that I take it, no one will be ſo hardy as to affirm. A Man voluntarily makes a Settlement to the Uſe of himſelf for Life, and after to other Uſes, and reſerves no Power of Revocation at all, he cannot revoke this, no not in Equity: And the Reaſon is the ſame as to a Power reſerved where it is not purſued; for he has no other Right to do it but by the Power, and it is as if he did it without a Power, unleſs he make a due uſe of ſuch Power as he had.

It will be manifeſtly inconvenient, if a Court of Equity have ſuch a Latitude in Powers of Revocation: For it is not ſufficient to ſay it is unreaſonable a Man ſhould be reſtrained, when a Man will fetter himſelf; nor do I ſee what Reaſon there is to ſay it is imprudent. Indeed, to argue thus, is to make a Man leſs Proprietary of his Eſtate, than the Law hath made him, that he ſhall not ſettle his Eſtate in ſuch a manner as he pleaſeth to order for himſelf; a Man at this rate is never Maſter of his Eſtate; he makes the firſt Settlement as Owner, and it is no matter, whether he hath a Reaſon for making it or no, *ſtet pro Ratione Voluntas*; but then, when he hath ſo done, both Law and Reaſon bind him to obſerve it, and there is no reaſon for a Court of Equity to avoid it.

I muſt confeſs Courts of Equity would have enough to do, if they were to Examine into the Wiſdom and Prudence of Men, in diſpoſing of their Eſtates, and if they were not diſcreetly, but fooliſhly done; therefore to ſet them aſide, there would need more Courts of Chancery than there are, to diſpatch the buſineſs of Equity in this Point; but be a Man wiſe or unwiſe, if he be legally *Compos Mentis*, he is the Diſpoſer of his own Property; and tho' he do not diſpoſe of it ſo diſcreetly, as a Judge or a great Lawyer would do, there is no reaſon Equity ſhould interpoſe to alter it.

Beſides, there may be a very good Reaſon for a Man to put ſuch a Reſtraint upon himſelf, and for a Wiſe Man to do it too: For a Man may know the Frailty of his own Temper, how apt he may be to be ſurprized, and prevailed upon to make a precipitate or inconvenient Will, Settlement, or Diſpoſition of his Eſtate: Now to reſtrain this Infirmity which I have, and to prevent an Inconveniency that may ariſe by my diſpoſing of my Eſtate upon a Surprize, I will reſtrain my ſelf, and ſettle my Eſtate ſo and ſo, that if there be a deliberate intention in me to alter it, I may ſolemnly execute ſuch intention; I will therefore have ſo many Witneſſes, and thoſe of good Quality, that if they find me about any ſuch Action, may adviſe me in it, and prevent any apparent Surprize into the doing of any Action that may be fooliſh, raſh, or prejudicial: For that Reaſon I will bring my ſelf under ſuch and ſuch Reſtraints.

And when we ſee a thing done that may have a good Reaſon given for it, as there may be for this circumſcribed Power, to reſtrain from raſh, ſudden Actions, it is to be preſumed, that it was done upon good Reaſon; and therefore the pretended unreaſonableneſs of fettering the Owner of an Eſtate by himſelf mentioned at the Bar, is no Argument againſt it: For it may be (and that is rather to be preſumed) upon very good Reaſon than upon no Reaſon at all.

Now I think it was never yet determined, or ſettled in a Court of Equity, that a Revocation that did not purſue the Power, was good in Equity: It has been ſettled and decreed not to be good, and that is the Caſe of *Arundel* and *Philpott*, which came firſt into the King's-Bench, and then into Chancery, and afterwards into the King's-Bench again, and there it had its Period. A Woman makes a Voluntary Settlement upon a Friend, with a Power to revoke upon the tender of a Guinea; and upon ſome falling out or Quarrel that happened between them, ſhe makes another Settlement upon *Arundell:* at firſt in the King's-Bench they could not prove the Tender of a Guinea, and ſo the Revocation was not good at Law; therefore they came into a Court of Equity to be relieved. It was held, that no Relief ſhould be had in the Caſe, altho there was Proof of a Provocation given, a Quarrelling and falling out, and ſo there might be ſome Reaſon to revoke, but no Reaſon to revoke otherwiſe than according to the Power: So the Bill was diſmiſt. Afterwards, upon a Tryal at Law that Matter was ſubſtantially proved, That in the Heat of the Provocation the Guinea was tender'd, and conſequently a good Revocation; and that I look upon as a full authority that there can be no Revocation in Equity where it's not a good Revocation at Law, unleſs there be a particular intention in the party to revoke, which he could not effect purſuant to the power by fraud or accident.

The Caſe of *Thorne* and *Newman* I take to be good at Law, and therefore to be ſure good in Equity; there was to be a tender of 12 *d.* at a Day in the Middle-Temple Hall, the 12 *d.* was tendered at the Day but not the Place, and accepted. That was before my Lord Ch. Juſtice *Hales*, and the party non-ſuited upon it. For upon a Condition to pay Money at ſuch a day and place, the Money be tendred to the Perſons at the day, tho' not at the place, that tender to the Perſon is

good,

good, being a Case of Money, but it is not so in a Collateral Condition for doing of any other thing. And tho' it had not been in that Case good at Law, it might be held to be good in Equity upon another account; because, there where Children in the Case, and it was to make Provision for them.

Now I do acknowledge that a power of Revocation not well executed at Law may be in Equity in some other Cases: As where a Man having such a power has a real intention to revoke, and his intention is known, but he is prevented by a particular Accident, and surprized when his design was so to do, but he could not perform that design, as by reason of Sickness, or that it was to be done in a place whither he could not go. If any Accident obstruct that Intention, it shall be lookt upon as good, and shall prevail.

But now in this Case of the Duke of *Albemarle*, it doth not appear that he had any such intention of executing his Power. It is true, he made his Will, which is a quite contrary disposition of his Estate. That is an Evidence of his intention to make a new Will, but not to revoke this Deed; He was no way hindred by any accident or irremovable Impediment from executing the Power according to the Circumstances. He was in the place where best of all throughout *England* he might have had three Peers to be Witnesses of it. The Will was executed in *London*, at Sir *Robert Clayton*'s House, and there were then two Peers in the House; Therefore since he had an Opportunity to have done it well, and would not do it, this can never be construed a good Revocation in a Court of Equity. And I think truly that any such Construction would induce many Absurdities. For,

First, It is to set up a power in a Court of Equity in direct opposition to the Courts of Law, and so let a Man loose in Equity for no other reason, but because he hath restrained himself at Law, by a Law of his own making.

Secondly, It is as much as to say, That because a Man my dispose of his Estate one way by Law, therefore in a Court of Equity he shall dispose of his Estate any way. That is a very strange, but a true consequence of this Doctrine, because a Man settles his Estate such a way with such a Power to alter it in such circumstances, therefore he shall do it any way. At this rate, Tenant in Taile may dispose of his Estate without a Fine in Equity, because he might have done it at Law with a Fine, for the same Equity there is in both Cases. So a Copyholder of Inheritance may in Equity dispose of his Estate without a Surrender, because he might do it at Law by a Surrender.

Thirdly, It were to enable a Man to give away more then he hath in him, for he has no more in him than what is according to the Power he reserved to himself. And,

Fourthly, 'tis to frustrate the intent and design of all Settlements whatsoever; so that I think there is no reason at all for this Court to let a man loose, that has thus restrained himself, unless there be some special reason in the particular Case, for the sake of which a Man ought to have his Case vary from the ordinary Rules.

Then let us consider next the Circumstances that the Duke was under at the time of making this Will, you that are for the Plaintiff, say that he had forgotten this Deed, and therefore it being an old and forgotten Deed, it shall not have any regard in a Court of Equity, it not being taken any notice of by the Party himself.

First, I pray consider whether the Evidence doth not prove the quite contrary: it was a Settlement made very solemnly; it is very well attested by six Witnesses, Persons of Consideration, it was done with deliberation, and done but in 81. the Will is in 87. It is not to be presumed that the Duke did or could forget a Setlement so solemnly and deliberately executed. I say it is hard to presume it, but rather the contrary, that he did not forget it.

Beſides, tho' he had forgot it, Sir *Thomas Stringer* who was ſo inſtrumental about this Will had not forgot it, for he made an Abſtract of it about that time with the very date in it. And I take it the memory of the Counſel in ſuch a Caſe, is the memory of the Client. Suppoſe a Man be to make a purchaſe and he carrieth the Deeds of the Title to Counſel, and he eſpieth a Truſt in the Deed, and acquaints his Client, and yet he will purchaſe, ſhall Equity relieve? It may be the Counſel overſeeth this Truſt, and the Purchaſer is called to account about it, ſays he, I had no notice, I knew nothing of any ſuch Truſt; I am a Purchaſer for a valuable Conſideration, and it ought not to affect me. But then they come and prove that the Deeds of the Title were carried to Counſel, they ſaw this Truſt or had an opportunity to ſee it. Then I take it, notice to the Counſel is notice to the Client, and the Man that paid the money muſt loſe the Eſtate: So here Sir *Thomas Stringer's* memory is the Duke's memory.

But pray how comes it to paſs that forgetting of a Deed is a ground to revoke it in Equity? muſt the goodneſs and validity of a Deed depend upon the memory of him that made it? Memory is ſlippery, but a Deed is permanent, and made to abide for ever. Becauſe Men are apt to forget what they have done, therefore ſhall their Deeds have no more effect in a Court of Equity, than if they had never been done at all? This I confeſs is very new and ſtrange Doctrine to me, when a thing once comes to be put into Writing, we ſay it is never forgotten; *Litera Scripta manet.*

But then truly they ſay it is inconſiſtent with the Honour of the Duke of *Albemarle* that he ſhould make this ſtir and do about his Will, and pretend ſuch kindneſs to Mr. *Monk*, and deſire a Title of Honour for him, and yet not intend to revoke this Settlement that ſtood in the way. The others they ſay, how is it conſiſtent with the Duke's Honour to intend to revoke it, when there was ſuch a friendſhip between the Duke and the Earl, ſo many Services and Obligations performed by the Earl, ſuch a Truſt and Confidence repoſed in him even to the laſt, as it is plain there was? How comes this to paſs? but ſo it is, they are Acts very much inconſiſtent I confeſs. But for perſons Honours in judging of Cauſes we have nothing at all to do with them.

For my part I ſee no reaſon in the World that the Duke had to alter his mind as to my Lord of *Bath*, there is no appearance of any unkindneſs or diſpleaſure conceived by the Duke againſt the Earl, but an intire Truſt and Confidence to the very laſt, as is evident by the Order of the Keys of the Evidence-Room to be delivered to him when he went away, and to conſult with him upon all occaſions.

But withal I do not know what the meaning of this ſhould be, if he really intended any effect as to the Will of 87, which without all queſtion is well proved; and were it not for this Deed, would be a good diſpoſition of the Eſtate. Yet tho' it doth contradict the Deed of 81, I cannot but take that to be a very good Deed, and not to be ſet aſide by this Will.

I have nothing further to conſider in this Caſe, nor are we to make Preſumptions, and then to make Inferences from thence. We are to judge upon the fact as it appears in the Depoſitions, which are plain and clear, and upon theſe we are to determine our Opinions, and nothing elſe that is dark, and that we cannot come at further than by conjecture.

There have been ſaid in the Cauſe, which I omit on purpoſe, becauſe I would mention only thoſe that are moſt material. Upon the whole matter I am of Opinion there ought to be no Relief in this Caſe againſt my Lord of *Bath*, and thoſe that Claim by the Deed of 81.

LORD-

LORD-KEEPER.

I Shall first take Notice how these Causes stand in Court, and who are the Parties in Judgment before the Court.

Here are Three Bills: One, in which the Dutchess of *Albemarle* was Plaintiff, and since the Inter-Marriage, my Lord of *Mountague* is also Plaintiff against my Lord of *Bath* and others Defendants, and this Bill sets out the late Duke of *Albemarle*'s Marriage-Settlement, and his Will of 87, with the Solemnity both of preparing and executing it, and doth complain that the Earl of *Bath* sets up another Will, and a Deed in 75 and 81, whereby he seeks to frustrate the Disposition of the Duke's Estate by the Will of 87. And the Bill doth alledge, That if any such Deed was ever executed by the Duke (which they have reason to doubt and do not admit) they believe the same was imposed upon the Duke by surprize and not fairly obtained, and by fraud were concealed from the Duke, and ought to be set aside in Equity, tho' the power of Revocation in the said Deed were not strictly pursued, because his intention appears to revoke it, and dispose of the Estate otherwise by making the Will in 87. And if it should not be set aside, then the Dutchess ought to have the Lands limited to her by that Deed, and the Rent-Charge of 2000*l.* a year over and besides the Joynture settled upon the Marriage, and confirmed by the Will of 75. And the Will of 87 ought to stand good, as to the Personal Estate and Legacies therein, and so prayeth to be protected in the Enjoyment of the Personal Estate, and Specifick Legacies given to the Dutchess discharged of the Duke's Debts.

There is another Bill brought by *Christopher* and *Henry Monk*, which complains of my Lord of *Bath*, and the others setting up this Will of 75, and Deed of 81; and I think in the same Words, or to be sure to the same effect with the other Bill, and prays that both Will and Deed may be set aside, and the Plaintiffs may enjoy the Benefit and Estate given them by the Will of 87.

Then there is a Third Bill of my Lord of *Bath*, Mr. *Greenville*, and Sir *Walter Clarges*, in which they set out the Will of 75, and the Deed of 81, and the continuance and constancy of the Duke's Friendship and Trust to the Time of his Death, and complain that the Dutchess and other Defendants set up the Will in 1687. and do pretend that amounts in Equity to a Revocation of the Deed of 81; and this Bill prayeth that the Personal Estate may be applyed to pay the Duke's Debts in discharge of the Real Estate, which they pray may be confirmed to the Plaintiffs in that Suit, and a discovery of the Writings about the Real Estate, and that they may be brought into Court, and delivered up to the use of the Plaintiffs.

These Causes were first heard before the Lords Commissioners, so long ago as the 8th of *July* 1691. then was there a Decree made, That the Personal Estate should be accounted for, and applied for the payment of the Debts; but before the Court would deliver any final Judgment as to the Real Estate, they ordered a Tryal at Law to be had in an Ejectment, wherein the Dutchess and Mr. *Christopher Monk* were to be Lessors of the Plaintiffs, and the Earl of *Bath*, Mr. *Greenvill*, and Sir *Walter Clarges* to be Defendants, to try the Title to the Real Estate: And the Plaintiffs were only to insist upon the Will of 87. and the Deed of 81. so as that the Defendants Right upon the said Will and Deed might be fairly tryed. And all Exhibits were to be left with the Master three weeks before the Tryal, for either side to inspect, take Abstracts and Copies of as they should think fit.

According

According to this Order in the *Michaelmas*-Term, after there was a Tryal at the *King's-Bench-Bar*, and upon that Tryal a Verdict paſt for the Defendants in the Ejectment, the Earl of *Bath*, *&c.* upon the Will of 75. and Deed of 81. After the Tryal theſe Cauſes came to be heard again before the Lords Commiſſioners about a year and a half ſince; at that time there was no complaint made of the Verdict, nor any Motion for a new Tryal. But after the Councel had been heard ſeveral days, the Court took time to conſider of their Judgment; and before Judgment one of theſe Cauſes abated by the Marriage of my Lord *Mountague* and the Dutcheſs, and by that and other Accidents the Cauſe hath been delayed till the late Hearing before the Court, aſſiſted by my Lords the Judges, who have delivered their Opinions. And now the Cauſes ſtand for the Opinion of the Court, upon what appears in the Pleadings and Proofs, and what has been ſo largely inſiſted upon on either ſide.

Upon which the Verdict being at Law for the Defendants, I muſt take it as my Lords the Judges have already declared, not only that theſe Deeds of Leaſe and Releaſe, of the 15th and 16th of *July* 1681. were duly ſealed and executed by the late Duke of *Albemarle*, but alſo that they ſtand ſtill in force, and unrevoked at Law; for if they had not been ſo, the Verdict could not have been, as it was, for the Defendant.

Therefore as that muſt be taken for granted, that theſe are good Deeds in Law, the only Matter at preſent for the conſideration of the Court, is, Whether upon the debate of this Cauſe there be ſufficient Ground in Equity for this Court to interpoſe in the Caſe, ſo as to ſet aſide theſe Deeds, as not good in Equity, or revo ed by the Will of 87. or no? And I ſhall, as to the Matter of the Queſtion, conclude my Opinion the ſame way with my Lords the Judges, that have delivered theirs before.

And with reſpect to this Matter, I ſhall here conſider who the Parties are in Judgment before the Court, and what hath been alledged as Reaſons and Grounds to induce the *Court* to ſet aſide this Deed in Equity.

Here is no Purchaſer in the caſe, no Creditor, no Child unprovided for, but all the Parties claim by voluntary conveyances on the one ſide and the other, ſo that at leaſt they ſtand equal; or, if there be any circumſtances as to the Perſons that have any weight, it is on the part of my Lord of *Bath*.

There have been ſeveral things inſiſted upon by the *Councel* for the Dutcheſs and Mr. *Monk*, as grounds whereon they would found that Equity which ſhould impeach this Deed of 81. I would mention them as I apprehend they were offered, and I will, as far as I can, avoid being tedious, or uſe unneceſſary Repetitions of what has been already ſaid.

Firſt, It has been offered, That this Deed was obtained by Fraud and Surprize.

Secondly, If it were Originally fairly obtained, yet it was unduely ſecreted and concealed from the Duke, that he could not come to know the true contents of his Power; or, if it were not concealed, yet it was utterly forgotten by the *Duke*, which was the reaſon and occaſion why ſufficient care was not taken to execute the Power as it ſhould have been.

Next, That tho' the power of Revocation was not literally executed, yet his intention appearing clearly to diſpoſe of the *Eſtate* otherwiſe, it ought to be ſupported in *Equity*.

Then, That the Deed of 81. was but Ancillary (that was the Phraſe) to the Will of 75. being agreed to be revok'd by the Will of 87. the Deed muſt fall with it.

Another thing was, That what the Duke had done amounted to a Revocation.

Then,

Then, That here was a General Truſt, and the Duke remained Owner of the Eſtate, and might charge it as high as he pleaſed to the utmoſt value, and ſo being abſolute Maſter of the Eſtate, his ſubſequent diſpoſition of it by this laſt Will ought to be made good in Equity.

There are many things accumulated together, and ſo make the better ſhew; but it is beſt to conſider them ſeverally, if we would know the true weight of them.

It is true, it is charged in the Bill, That this Deed was obtained by Fraud and Surprize, and that it was concealed from the *Duke*, or forgotten by him, and he had an intention to revoke, and went as far as he could; ſo that they are ſufficiently let into this Matter by what is charged in the Bill. But whoſoever reads over the Depoſitions, will ſee that the End they aimed at was, to attack the *Deeds* themſelves as *falſe Deeds*, and not truly executed: But that being tryed at Law, and the *Will* and *Deeds* verified by a Verdict, the Counſel have attempted to make uſe of the ſame Evidence, and read it all, or at leaſt the greateſt part of it, as Evidence of Surprize and Circumvention.

But I think that ought to be well conſidered by the Court, for we are not to found our Judgment upon that Evidence, which if it be to be regarded at all, did amount to more than what was inſiſted upon, and which is poſitively contradicted by the Verdict. As to Fraud and Circumvention, it muſt be granted me, that they are things not to be preſumed: It is all denied in the Anſwer, and the Proof muſt be very clear, if it be to be regarded by the Court.

Now, for this word [*Surprize*] it is a word of a general ſignification, ſo general and ſo uncertain, that it is impoſſible to fix it: A Man is ſurprized in every raſh and indiſcreet Action, or whatſoever is not done with ſo much Judgment and Conſideration as it ought to be. But I ſuppoſe the Gentlemen who uſe that word in this Caſe, mean ſuch Surprize as is attended and accompanied with Fraud and Circumvention: Such a Surprize indeed may be a good ground to ſet aſide a *Deed* ſo obtained in Equity, and hath been ſo in all times; but any other Surprize never was, and I hope never will be, becauſe it will introduce ſuch a wild Uncertainty in the *Decrees* and *Judgments* of the Court, as will be of greater conſequence than the Relief in any Caſe will anſwer for.

They ſay, This Surprize was made out two ways, by Matters that appear in the Deeds themſelves, and by Circumſtances in Proof that ariſe out of the Deeds.

As to thoſe Matters that appear in the Deeds themſelves, they urge,

Firſt, That it is expreſſed in the Deed of Releaſe, that it is made in corroboration of the Will, which is miſrecited throughout.

Then, That it is imported to be for the confirmation of the Will, when in effect it doth fully revoke it, becauſe there are no Limitations in the Deed, but ſuch as vary from thoſe in the Will.

Then, That it is for ſecuring the Legacies in the Will, and yet itſelf defeats the Will.

That as to a great part of the Eſtate the Deed limits it to my Lord of *Bath*, after failure of Iſſue-male, excluding the Daughters; whereas in the Will that Limitation is after failure of Iſſue generally.

That the Proviſion in the Deed for the Third Son is ineffectual, becauſe the *Duke* had not power to ſettle it ſo.

That the Power of Revocation is unreaſonably fettered, and the Covenant whereby the *Duke*, who was then very young, is obliged not to revoke the Will, is a derogatory and illegal Covenant.

And the unskilful Phraſe and Language of the whole Conveyance muſt be a Demonſtration, that Sir *William Jones* was not imployed in it as is pretended: Theſe are the Objections to the Deed it ſelf.

Now as to the Miſrecitals, as my Lord Ch. Juſtice has ſaid, they will have no influence upon the Limitations, becauſe the Recitals in a Deed are not made the meaſure of the Limitations in it. Beſides, as I apprehend, here are none of theſe Miſrecitals which are of that nature, as to draw on the Duke into a Miſtake in the favour of my Lord of *Bath*: For the Recital, that the Dutcheſs had a much greater Eſtate by the Will than ſhe had before, as the Limitation of *Dalby* and *Broughton* for Life, when it was but during Widowhood; this might lead the Duke indeed into a Miſtake in favour of the Dutcheſs, (as it did) and might have induced greater Limitations of the ſame kind, but never to the Advantage of my Lord of *Bath*, who was to come in remainder; ſo that all the inference that can be made from thoſe Miſrecitals, is only, That Sir *Tho. Stringer* who (it is apparent in Proof) drew the Deed, was a careleſs Man.

Then they ſay the Variation of the Limitations from thoſe in the Will ſheweth, That it was to revoke the Will, and not to confirm it. As to that,

Firſt, Such Variation is a Proof, That the Duke between the Time of the Will, and the Time of the Deed had altered his Mind as to thoſe particulars, but to carry it further I ſee no reaſon in the World.

Next it hath been obſerved, That the Words of the Deed, which purport the end of it to be for confirming of the Will, muſt plainly in reaſon infer to the principal deſign of the Settlement, which was to diſpoſe of his Eſtate to my Lord of *Bath*, and the neareſt of his Relations, and not to refer to every particular Limitation in the Will; and that it doth ſo confirm the Will as to the main principal Limitation in the Will is plain: And it doth appear by the very phraſeing of the Deed, that beſides the confirming of the Will, he did mainly deſign the ſettling of his Eſtate.

Then let us conſider the differences in point of Limitation between the Deed and the Will.

Firſt, They ſay in the Deed, There is an Eſtate limited to the Duke for Life, which is not in the Will; that is proper in a Deed, but would not have been abſurd in a Will which is not to take effect till after his death.

Then for that Variation in the Limitation to the Dutcheſs, it is not material in point of Value, but for duration of the Earl, and it was a reaſonable thing ſo to make it; for ſince he did intend to charge his real Eſtate with great Legacies, it had been impoſſible to have ſold any part of it that had been under a Rent-Charge of 6000*l.* a Year, and therefore it limits Lands of that Value.

As for the Limitation of *Norton Diſney*, which indeed is to the advantage of my Lord of *Bath*, and is the only variation from the Will which is ſo; for with reſpect to the *Eſſex* and *Nothern Eſtates* my Lord has but a Remainder after failure of Iſſue in General, but in this it is after failure of Iſſue Male. But then it is to be conſidered that the Honour would fail upon the Duke's Death without Iſſue Male, and he did intend and deſire that the Honour of Duke of *Albemarle* ſhould come to my Lord of *Bath*. His Father had gone ſo far in it as to procure a promiſe of it under the Sign Manual by K. *Charles* the 2*d*. And at the ſame time he had an Eſtate of 15000*l.* a Year, and then it became him well that ſuch a part of the Eſtate ſhould go with the Honour.

As to that Objection, that thereby there was no proviſion made for Daughters, it were indeed a very great one, if indeed there were no proviſion at all for them. But it means no more than that if he left no Sons, there would be an ample proviſion out of the reſt of his *Eſtate* for Daughters: And ſo in effect it is upon the Mar-

Marriage-Settlement and the Will of 87. So that if it be an Argument of Surprize as to the one, it is the ſame as to the other.

Then for that proviſion that is made out of *Rotherhith* and *Norton Diſney*, for the third Son; it muſt be admitted that as to my Lord Duke's mind in the matter it would be ineffectual, but there can be nothing infer'd from thence but that there was a great neglect of looking into the Settlement: But that will be no ground in Equity to relieve againſt this Deed; for if it ſhould be ſo, how many Settlements muſt we ſet aſide upon Mens ſetling that over, which in part they had no Power of making ſuch diſpoſition, becauſe the perſons concerned in drawing the Settlement did not take ſufficient care in every Particular to purſue the Power he had who makes the Deed.

Beſides there is the ſame miſtake in the Will of 87, in relation to *Potheridge*, where the Barony for Mr. *Monk* was to be fixed, it being by a Settlement in King *Charles* the firſt's time ſo ſetled in Tail, that it could not, or was not legally to be diſpoſed of by Will.

Indeed it was ſaid, that there were ſome Articles made with *Pride* about that matter, to carry the Eſtate according as the Duke ſhould direct: But thoſe Articles cannot anſwer the Objection, for they were made three Months after the Will, and then they were made with a wrong Perſon, and ſo ſignify nothing.

It has been objected, That this Deed pretends to be for ſecuring the Legacies in the Will of 75, but defeats them. That is a Miſtake in the Objection, for it confirms the Will certainly as to the Legacies, and doth create a Truſt for performing and paying them: indeed by a ſubſequent Act the Will of 87, there may be an Alteration made, but that is no Argument againſt this Settlement itſelf.

There was another Obſervation made, and that was, That the Power of Revocation was unreaſonable, eſpecially back'd with ſuch an unreaſonable Covenant not to revoke. But as to that, it is to be conſidered what the Deſign of this Settlement was, he had made his Will before, but he thought himſelf unſafe under that Diſpoſition; he was under apprehenſion of being applied unto and importuned to diſpoſe of his Eſtate otherwiſe than he had a mind it ſhould go, therefore he intended this Settlement as a Guard againſt any Surprize of that kind; and that being his Intention, if it had been only a general power of Revocation, it had been no more than what any Will or ſubſequent Act done by him would have effected, but that had not anſwered his meaning.

And ſo as to the laſt Covenant in the Deed, which they call the Derogatory Clauſe, whereby the Duke covenants not to revoke the Will otherwiſe than as aforeſaid. I take it, that doth import no more, but that as to the preceding part of the Deed he guards himſelf againſt Surprize as to the real Eſtate, ſo he doth here as to the perſonal Eſtate. And tho' it prove ineffectual at Law, that is not material as to the Intention of the Duke.

The laſt Obſervation upon the Deed is, the penning it, which is an Objection that is to go through the whole Deed: but this Objection goes further than the point for which it is alledged, for if it prove any thing, it proves it to be a falſe Deed. But for this I do not find it ſo much as ſuggeſted, that this Deed was drawn by Sir *William Jones*; my *Lord* of *Bath* indeed ſays that it was left to the Care and Conduct of Sir *William Jones*; but as to what appears, he was onely concerned in the Proviſo; for it is very good reaſon to believe, when he ſays, *I approve of this Proviſo*, he did not refer his Opinion to any other part of the Deed. And indeed any one that knew or remember him will think that he concerned himſelf with no other part but what he ſet his hand to the approbation of.

I have taken notice of theſe Obſervations as Arguments urged by the Counſel, which taken altogether ſhould induce their ground of Equity from a Surprize in obtaining this Deed; but when they are ſeverally conſidered they ſeem not to be of ſuch weight as is contended for.

But

But if the Obligations had been more in number, or of greater conſequence, yet let the Deed be never ſo ill drawn, and the Miſtake and Miſ-recitals never ſo many, and the differences of Limitations in the Deed from thoſe in the Will never ſo many too, yet if this Deed were really executed by the Party, all this will not be a ſufficient ground in Equity to ſet aſide this Deed. And the Counſel for the Plaintiffs were well aware of this, and therefore they go to other Circumſtances out of the Deed to ſhew this Surprize, and as far as I can obſerve the Objections upon this point are theſe.

That there is no Proof of any previous Direction for drawing of this *Deed*, there is no Proof of the *Draught* or *Deed's* being read to the *Duke*, no Counterpart was executed: The Truſtees were not acquainted with it, there was an Eſtate limited to Sir *Thomas Clargis*, when there were great differences between the *Duke* and him; it is not ſubſcribed by the *Duke*'s Counſel, as all *Deeds* executed by him uſed to be; that it was ingroſſed according to the *Draught*, and that in a very material place, for if it had been according to the *Draught*, the *Duke* had been Maſter of the Eſtate by a general Truſt; and if it were not peruſed by Sir *William Jones*, or he was not a Witneſs to it, then ſo far as Sir *William Jones* was ſurprized in the matter, the *Duke* was ſo too.

Now as to the want of Proof of any previous Directions for this Deed, that is not ſtrange after ſuch a length of time Sir *Thomas Stringer* who drew it, dead, four of the Witneſſes to the Execution of it are dead too. But the preſumption is very ſtrong, when the Draught is of Sir *Thomas Stringer*'s Son's Hand-writing, and corrected, and interlined by his own hand in ſeveral places, that he had Orders and Directions from the *Duke* to prepare ſuch a Deed.

The Reading, or not Reading the *Deed* to the Duke, doth not appear it might be read to him before, and it was not neceſſary it ſhould be read to him at the time of the Executing; if it were, then the Will of 87, lies open to the ſame Objection, for that was not read to the Duke when he ſealed it.

As to that Objection that there was no Counterpart, nor the Truſtees acquainted with it, that can be nothing of an Objection, for the *Deed* remained in the Duke's hands, till a little time before his going to *Jamaica*, as appears by my Lord of *Bath*'s Anſwer, which hath not been falſified, as I know of, in any point; nor was there any Occaſion to give Notice to the Truſtees, becauſe there was no manner of Eſtate, or Truſt lodged in them. But my Lord of *Bath* was the only Perſon that had any Truſt in him by the *Deed*, therefore there was no Reaſon that it ſhould be known to any one but him. And the Nature of the thing, and all the Proofs ſhew, that it was intended to be concealed.

Then as to the Story of Sir *Tho. Clargis*, and the *Differences* between the Duke and him, there is no Proof of it: It is at moſt but an Hear-ſay, teſtified by one Witneſs.

That it was not Subſcribed by the Duke's Counſel, as all his *Deeds* uſually were, it ſeems to me to be of no very great Weight, when the *Draught* appears under Sir *Thomas Stringer*'s Son's Hand interlined, and corrected by himſelf, and Sir *William Jones* a Witneſs to the *Execution*, and preſent when it was compleated: Sure that can never ſignifie any thing.

As to the other *Obſervation* that was made, that the *Deed* was not Ingroſt according to the *Draught*, and the Variation is in ſo Material a part, as to make the Duke Maſter or not Maſter of the Eſtate; it ſhould be conſidered, Firſt, That upon view of the *Draught*, it is plain, Words have been cut off; and there is a poſitive Witneſs, who ſwears, That he twice Ingroſt the *Deed* by the *Draught*. It is poſſible, that a Man may twice leave out the ſame Words in Ingroſſing a *Deed* by a *Draught*: But, that he ſhould twice add the ſame Words that were not in the *Draught*, is very ſtrange, and not eaſily to be believed.

Then

Then say they, *This is not the Draught that was first perused, and approved of by Sir* William Jones. That is certainly such an Objection as never was made before; and indeed it is likely there never was Occasion to make such an *Objection*, till the last Hearing, for it may be it was not cut till then. But pray let it be considered, for whose Interest it was to have this Draught cut, or altered from the Ingrossment. It is impossible it should be cut out for the Interest of my Lord of *Bath*, by the *Objection* that ariseth from it; for let any Words in Nature have been there, they could not have been of such Disadvantage as they would have it to be. However, be the alteration of the *Draught* what it will, if it were not done by the *Defendants*, nor was for their Interest to be done, nor done before the *Execution of the Deed*, it all signifieth nothing.

But I think it is fit and proper here, to say something to that Notion, that where the Counsel is surprized, that is a surprize upon the Client. I take that to be a matter of a very great Consequence, and I fear it would shake most of the *Settlements of Estates* in *England*, and for that I would mention the Case of Sir *James Herbert*, and the late Lord of *Pembroke*. There was a *Bill* brought in this Court, to set aside the *Will* of the Elder Brother, who was the late Earl of *Pembroke* but two. Sir *James* was Heir at Law, and the other was but half Brother.

That Earl had taken a Displeasure at his Brother, and sent Directions to Mr. *Swanton* to draw a *Will* and *Settlement* of his Estate, and amongst other things, orders to be sure that the Brother should have no power over the Estate, to dispose of it; & because that in his Grandfather's *Will* there was such a *Settlement* as he liked of, he sends him that, *Swanton* makes a *Will*, and limits an Estate to Sir *Philip Herbert* the Brother for life, and the remainder to the Heirs of his Body. This *Will* is brought by the Counsel to the Earl, and read, and Executed, and held to be Good, yet this was a *Notorious Surprize* upon the Counsel; for nothing is plainer, than that the Counsel had made a Mistake, or knew not the Law. He did not, at best, consider, that upon such a Limitation, the Law uses the whole Estate Tale in him, and he may dispose of it.

It is plain he had not pursued the *Will* of the Grandfather; but yet when this *Cause* came to be heard before my Lord *North*, when the *Will* appeared to have been truly executed, the Court declared it was a Misfortune, that they did not go to a better Counsel. And it was sent to Law, to try whether it was the *Will* of the Earl of *Pembroke* or no; and it being found to be the Earl's *Will*, the *Bill* was dismist with *Costs*.

Thus I have taken Notice of what has been offered to prove the *Surprize*. I would shortly mention on the other side, what hath been insisted upon, to shew that there was nothing like *Surprize*; but all was done upon a very good ground, and pursuant to a setled full purpose, continued for so long a tract of time, to the Duke's death.

First, Say they, It doth appear there were a very near Relation between my Lord Duke, and my Lord of *Bath*; and that Duke *George* owned, and owed his first setting out in the world, to the *Ancestors* of my Lord of *Bath*: It doth plainly appear there was a most particular Friendship, and mutual Confidence between them, in Matters of the Highest Nature, and Chiefest Concern: Nay, that this proceeded so far on my Lord of *Bath*'s side, in Duke *George*'s time, that he prevailed with King *Charles* the II. to promise under the *Sign Manual*, and recommend it to his Successors, to Create my Lord of *Bath* Duke of *Albemarle*, if here were a failure of Issue by the Duke.

Then that this Friendship did continue between Duke *Christopher*, and my Lord of *Bath*, is plain beyond all Controversy; for it began upon a very good Foundation: That is, Whereas the Garter should have been given

to the Earl of *Bath*, he prevailed to have it returned to the Young Duke, and it continued ſo much all along, that there was nothing of Moment relating to the Duke's Affairs, in which the Earl was not mainly concerned. And all this is proved by a Series of Letters, continuing down from the Death of Duke *George*, to the Death of Duke *Chriſtopher*.

In 74 he ſends him Word he had purſued his Advice, and his Advice ſhould always be very prevalent with him.

In 75 he tells him, he expected to ſee him with great Impatience, becauſe he was not able to go on in the Regulation of his Family, without his Aſſiſtance and Advice; that he had finiſhed his *Will*, and would make all more Perfect when he came to him. It ſhould ſeem his former *Will* was truſted in my Lord's Hands; and when that was returned, or brought up, in a few Days after, this *Will* of 75 is made, and by that, all the Eſtate, or the main of it, is given to my Lord of *Bath*; and it was the firſt *Will* I think that he made, after he came of Age, and had any Power to diſpoſe of his Eſtate in Land; and thereby, as I ſaid, he Deviſeth the bulk of it to my Lord of *Bath*. He always deſired, as the *Will* declares, That in caſe he had no Iſſue, the Earl might ſucceed him in his Honours and Eſtate, as well out of true Affection to him, as his neareſt Kinſman on his Father's ſide, as out of due Gratitude for the many Acts of Kindneſs and Service done by the Earl, beyond all the reſt of his Kindred and Friends; upon which, he humbly deſires his Majeſty to confer the Dukedom upon him, and that the Eldeſt Son of the Earl, and ſo ſucceſſively the Eldeſt Son of the Family, ſhould be called Lord *Monk*, to preſerve his Name and Honour in Memory of his Father, and of himſelf. There cannot be Words that expreſs more Kindneſs and Reſpect, and intention of Advantage than are here uſed.

There was an Attempt, by Proofs in this *Cauſe*, to ſhake the Credit, even of this very *Will*; but when the Counſel, on that ſide, came to ſpeak to it, they could produce no proofs that would at all come near it: It is plain then, that at this time no Man could have more Kindneſs for another, than the Duke had for the Earl.

In the Year 78, there appears the ſame ſenſe in the Duke of the Earl's Friendſhip, by his Letters, and the Obligations of *Gratitude* he had to him. That he had no Friend in whom he could confide but himſelf, and deſiring him to come to aſſiſt him in the Management of his Affairs. That his Kindneſs and Friendſhip was never to be forgotten, without the Higheſt Ingratitude.

All this is a ſort of Evidence, againſt which there is no oppoſition to be made: ſo it alſo continued to the Year 80. when he ſent him word of a Servant's death, and deſired him to ſecure his Papers and Accounts.

Thus it ſtood to the time of making that *Settlement*; and while the Duke and he were upon ſuch Terms with one another, it was no ſtrange thing that he ſhould make ſuch a *Deed* as this, and the manner both of preparing and executing it, ſeems far from having any thing of ſurprize in it.

Then the next thing that hath been urged, was, that this being a Settlement, under a power of Revocation, which he intended to make uſe of, it was Secreted and Concealed from him; ſo that he could not know what his Power was; and ſeveral Caſes were put, where a Man, in ſuch Circumſtances, knowingly ſuffers a Purchaſer to go on with his Bargain, he ſhall not have any Advantage by ſuch a Concealed Settlement. Thoſe Caſes were all admitted to be good, and particularly, that mentioned by Mr. Baron *Powell*, and my Lord Ch. Juſt. *Treby*, the Caſe of Mr. *Clare*. And I think truly I need go no further, than to ſay, That there is no Reſemblance between that Caſe and this. That is, where a *Purchaſer* is concerned, and the Perſon that

conceals

conceals the *Deed*, ſuffers the *Purchaſer* to proceed without giving him any notice.

If indeed there had been a full and clear Proof, that the Duke had a real intention to *Revoke* this *Deed*, if he could have known what he was to do in order to it, and had been hindred by the *Fraud* and *Contrivance* of any Perſon concerned in it, in point of Advantage; and if by ſuch Concealment it was impoſſible for him to know the true Circumſtances of his Power, that would have made a different Conſideration in a *Court of Equity*; but there is no Proof that theſe *Deeds* were ever in the hands of my Lord of *Bath*, till ſome little time before the Duke went beyond Sea, when the Duke delivered them to him.

For as to *Aleman*'s Depoſition, that was but a delivery upon the Execution, and not a delivery for Cuſtody.

And my Lord of *Bath* in his Anſwer ſays, He had not them till then expreſſly; ſo that, as far as that goeth, it is all the Evidence you have, where the *Deed* lay all the while. And his Anſwer is fortified in this, by what Mr. *Courtney* ſays, that my Lord told him, when he came to him, that the *Deed* it ſelf was in the Hands of the Duke, and he had received the *Draught* from the Duke, to adviſe upon. And it is further verified by two Material Facts, by the Abſtract that was taken about ſome two Years before, by Sir *Thomas Stringer*, and by what is admitted on all hands, was by my Lord of *Bath* delivered up, when the Will of 87 was preparing; and that the Will of 75, and *Deed*, being produced together, under the Duke's Seal, after his death, it is to be taken, that both together were put under the Cover, and Sealed up by the Duke, and delivered to my Lord of *Bath*, as he himſelf ſays in his Anſwer. There being then ſo much ground to believe, that the *Deed* was in the Duke's own hands, what Obligation ſhould there be ſuppoſed to lie upon my Lord of *Bath* to make any mention of it to him? It was always intended to be a private thing; that is plain. There is no Proof what the purpoſes of the Duke were in making the Will, the Purport and Effect of the thing ſpeaks it ſelf.

But my Lord of *Bath* ſays, That upon the ſelling of *Dalby* and *Broughton* to my Lord *Jefferies*, he did give the Dutcheſs a Caution not to be ſo earneſt for finiſhing the Bargain, for ſhe might be a loſer by it, which could mean nothing, but that ſhe had an Intereſt in it by this Deed.

As to the Objection, that my Lord of *Bath* ſtood by, and ſaw that *Purchaſe* made, and gave no notice of this Deed to the *Purchaſer*, I confeſs, had my Lord of *Bath* ſet up this Deed againſt, and to overthrow that *Purchaſe*, that would have brought it up to the Caſe of *Wraw* and *Ford*; but every body knoweth that a bare voluntary Settlement is of no force againſt a *Purchaſer*, without notice; and as to the Leaſes, and Grants of Annuities, there is no Proof that ever my Lord of *Bath* knew of them.

Then it was Objected, that tho' it go not ſo far as purpoſed Concealment, yet the thing was out of mind, and the Duke continuing *Owner* of the *Eſtate*, and acting as *Owner*, tho not with all the Circumſtances required, thoſe Acts done by him as *Owner*, are to be *Supported* in a *Court of Equity*. This ſeems a hard Demand for a Voluntary Deviſe, to crave Relief againſt a prior Settlement, with a Power of Revocation, becauſe he that made that Settlement had forgotten it. There is no Precedent to warrant a *Decree* of that Nature, nor is there any Pretence of Reaſon for it: For betwixt Two Perſons, each of which claim by a Voluntary Settlement, the matter ſtands upon an equal Foot, and there is no poſſibility of an Equitable Conſideration, to aſſiſt the one againſt the other.

And

And if there were any Ground for it, as a Notion, there were no Room for any ſuch Notion as to the Proof in this *Caſe*. For it is founded upon a Suppoſition that the Duke of *Albemarle* had forgotten the Settlement; of which there is no Proof, but only an Argumentative one, drawn from his diſpoſing of his Eſtate another way and manner. But that he had not forgotten it, beſides the Anſwer of Mr. *Greenvil*, and Sir *Walter Clarges*, there are other things to be ſaid. And as to their Anſwers, I take it, no *Decree* can be made againſt a Man's Anſwer, upon the Proof of one Witneſs; Why then ſhould a *Decree* be expected againſt a Man's Anſwer, where there is no Proof to the contrary at all?

Sir *Walter Clarges* (upon ſomewhat that had been told him of the Duke's intentions towards him by this laſt *Will*) as ſhould ſeem took the liberty to complain to the Duke, and ſeemed much diſcompoſed; but the Duke bid him not be concerned at what *Stringer* ſaid, for he had otherwiſe better provided for him: Now there is no other Proviſion, but what is by this Deed.

Mr. *Greenvil* addreſſed himſelf to the Duke, to thank him for what Kindneſs (Sir *Thomas Stringer* acquainted him) he had ſhewn him in his *Will*: but the Duke replied, (with ſome Reflection upon Sir *Thomas Stringer*, who pretended to have been very Inſtrumental in it) that he had never moved him in it; but that he had taken Care of him, and his Brother would tell him wherein; and if he would, he might tell his Brother he ſaid ſo. And he ſwears he did go to his Brother, my Lord of *Bath*, who told him The Duke had indeed Provided for him, and Setled a part of his Eſtate upon him: But that if the Duke had not allowed him ſo to do, by ſending him to him, he would not have told him of it.

All this is a full Proof that the Duke had not forgotten this Deed at that time; but it cannot be believed, that the Duke had ever forgotten this Deed, without disbelieving ſeveral Acts that have been ſubſtantially proved to be done by him, as when upon my Lord *Lanſdowns* Marriage, his Letter does particularly take notice of a great Intereſt he had in him, and ſeems expreſly to refer to this very Deed, as being ſo much concerned in his good or ill Fortune, as my Lord of *Bath* himſelf very well knew; and congratulating the Match with my Lord Treaſurer's Daughter, he goes on to deſire, That as he had taken care to Marry him well, ſo he would have great Regard to his Education, which he did mind him of, remembring ſtill that he was moſt concerned in him, of any one except himſelf, as he very well knew. This could refer to nothing but ſome Settlement of his Eſtate, and none appears but this.

There ſeems to have been ſome Attempt to interrupt this Friendſhip, and Amicable Correſpondence between the Duke and the Earl; for by a Letter dated (as I take it) 31 *Jan.* 81. The Duke ſays, his Kindneſs and Friendſhip ſhall always be the ſame, and all the malicious endeavours of ill people ſhall not be able to break the Link between them; ſo that it ſhould ſeem there were malicious Endeavours uſed, to ſow differences between thoſe Noble Perſons, but by whom, is not apparent in the Proof.

But ſtill there is a continued Series of kind Letters between them, which goeth on even to the time of making the *laſt Will* in 87, as full of Gratitude (all the Duke's Letters, great numbers of which were produced) as can be for his continued Services and Kindneſs; nay, down to the time of his going to *Jamaica*, and while he was there. Now it looks to me very ſtrange, that the Duke ſhould all this while be receiving Obligations, and owning them from my Lord of *Bath*, and yet muſt be ſuppoſed to have forgotten what he had done, in acknowledgment and recompence of theſe Services.

Then

Then there is beſides all this, the Poſitive Teſtimony of Mr. *Croſts*, and his VViſe, both ſwearing particular Declarations from the Duke's own Mouth, which can have Relation to nothing but this Deed.

There is indeed one thing that this urged as a ſtrong Argument the Duke intended to alter this Settlement; that is, his taking ſuch formal ſteps in preparing and drawing this laſt VVill, his Adviſing with my Lord Chief Juſtice *Pollexfen*, and ſo much Solemnity as was uſed in having the parts of it ingroſſed, and delivered with ſuch Ceremony to three ſeveral Hands. It is, they ſay, hard to imagine he would do all this with a deliberate intent, that it ſhould all ſignifie nothing as to his real Eſtate, and ſo quit the World with a great deal of Pageantry and Ceremony to no purpoſe.

Now it muſt be owned, that it doth ſeem a ſtrange part in the Duke, and the World muſt be ſurprized at it: For it is impoſſible to make the Duke's Actings of a-peice, and reconcile ſuch Contradictions. He cannot indeed be cleared from Prevarication. He did certainly intend to deceive the Dutcheſs, or my Lord of *Bath*. It is moſt evident he did keep my Lord of *Bath* in hand, that he ſhould have his Eſtate; for beſides the Teſtimony of Mr. *Prideaux*, and other Witneſſes, concerning the Duke's Declaration of his intending to ſettle, and having ſettled his Eſtate upon him, we find by this Deed, his Eſtate is ſo actually ſetled, and that Mind continued till 81; and it appears by Letters, as well before, as ſince; that Duke *Chriſtopher* intruſted him in all his Affairs of Conſequence, acted not in any thing, but with his aſſiſtance, continually made uſe of his Friendſhip at Court, to the time of his Death: when he was diſſatisfied with any of his Servants, my Lord of *Bath* was the Man that muſt ſettle the matter; when he was to Purchaſe, my Lord *Bath* muſt buy for him; when he was to ſell, my Lord of *Bath* was to tranſact the matter; when he wanted Money, my Lord was to procure it for him; when he was in danger of loſing Money, my Lord is applied unto to prevent it. All this appears by the ſeveral Letters that have been read and produced. When he was gone to *Jamaica*, and any Requeſt at Court, my Lord's Intereſt was that which he relied upon; my Lord of *Bath* was the ſingle Truſtee to be applied to chiefly in what concerned the Eſtate; the Keys of the Evidence-Room were to be depoſited with him, as being principally Concerned, if he ſhould miſcarry.

Now it muſt be confeſſed, a Man may do as much as all this comes to, and make uſe of another Man's Friendſhip, and not deſign to give him his Eſtate, when he had once firmly ſetled it ſo, and repeated his Aſſurance of Kindneſs, and continued to make Profeſſion of Kindneſs all along, to the time of his Death, and went on to make uſe of his Service, becauſe he thought he might freely command the Service of one who expected to have ſuch Advantages from him; yet then I do not ſee but that it muſt be admitted, that he did deliberately deſign to impoſe upon my Lord of *Bath*, or if he did not, he did intend to impoſe upon my Lady Dutcheſs. Now be it which it will, I do think he is not to be excuſed in reference to the Point of Honour, as to the Requeſt made to the King for the Earl of *Bath*, and in purſuance of Duke *George* his deſire, who engaged the late King to promiſe under his Sign Manual, and he hath made the ſame kind of Requeſt for Mr. *Monk*.

Now upon the whole Matter, whether this VVill of 1687. was made to free him from ſome Importunities in his Family, is a great Queſtion. There

are ſome proofs in the Caſe, that greatly look that way: It is plain he did not execute it for ſeveral Months after it was prepared and drawn, and when it was publiſhed, it was obtained with great Importunity againſt his Inclinations at that Time; and there doth not appear any Intention, that it ſhould revoke this Settlement; but on the contrary it ſhould ſeem he did not intend ſo, for there are no VVitneſſes called to the VVill, but the ſame that came with *Stringer* from *Newcaſtle*-Houſe to that purpoſe; But whether he did intend it ſhould take Effect as to the Perſonal Eſtate only, or to delude my Lord of *Bath*, which way his Honour is beſt ſaved, is not at all to our purpoſe to conſider upon the Caſe before us in Judgment. Though I muſt ſay, take it one VVay or the other, he ſeems to blame, and to have dealt in ſome ſort double.

The next thing inſiſted upon is, That this Deed is revoked in Equity of this VVill; and though the Power be not purſued in all the Circumſtances, yet his Intention appearing to make this different diſpoſition of his Eſtate, a Court of Equity ſhould ſupply that defect.

Now I take it for granted, that a Power of Revocation ſhall not be carried further in a Court of Equity, than the Law will carry it. The Law hath been liberal in expounding Powers of Revocation favourably; and where the Law expounds a thing according to an equitable Conſtruction, there is no reaſon for Equity to extend it further.

Where there appear to be other equitable Conſiderations, it may have another Judgment, but if it ſtands without any mixture of other equitable Conſiderations, I think it would be very hard to break through a Settlement, eſpecially ſo ſolemnly made, that he thought fit to reſtrain himſelf from altering it, without the Aſſiſtance of ſo many Noble Perſons, whenever he would make uſe of the Power thereby reſerved to him; I ſay it would be a very ſtrange thing for a Court of Equity, without the mixture of any other Conſiderations to aſſiſt another voluntary Conveyance againſt this.

The Caſe of *Arundell* and *Philpot* is a full Authority in this Caſe, and it has been ſo often repeated that I need not mention it any further.

As to what was inſiſted upon by ſome about the Revocation, being compleated as to the number of VVitneſſes, by the publication in *Jamaica*, and the impoſſibility of having any Peers there; I muſt confeſs had the Duke in *Jamaica* had an expreſs deliberate Intention and Purpoſe, to revoke and done any Acts to teſtify it, and gone as far in purſuance of the Circumſtances, as his Condition in thoſe parts would admit, that might have come in within that Foundation of Equity (to wit) Accident.

But I think there is no ground of Proof of any ſuch Intention or Action. For the Proof amounts to no more than this. The Duke, to prevent any troubleſom Applications to him, ſhut up himſelf in his Room, and thoſe that came to him were to come in at the Window. And a ſtrong Box in which his Papers were, ſtanding under the Window by frequent trading upon it, he had a Suſpicion that there had been ſome Attempts to force and open it; whereupon he calls for the Box to open it, and out of it takes ſeveral Papers, which he read, or gave to Dr. *Sloan* to read, ſeveral Letters as I remember, and afterwards he took up a ſealed Pacquet, and ſaid to the Doctor, *This is my Will*, and put it down again. Is this any manner of proof in the World, that this Act was done *animo teſtandi?* Much leſs is it any proof that there was any notice taken at this time of this Settlement, or that he would avoid it.

I would ſay ſomething to that other Point, that this being a Deed made to confirm and corroborate the Will of 75, is but Ancillary to the Will, and depends upon it, and is to ſtand or fall with it, and upon the Revocation of that Will did fall with it.

This is an Objection wholly inconſiſtent with the other Arguments that are uſed againſt this Deed, that it was by Surprize. For by thoſe Arguments they would deſtroy the Deed as inconſiſtent with the Will, but now the Argument is turned the other way. But my Lord Chief Juſtice *Holt* has ſo fully and clearly anſwered that matter, that I ſhall not need to trouble you with ſaying any more in it. The Caſes cited about it are in no ſort applicable to this Caſe.

The laſt thing inſiſted upon, was, ſuppoſing the Deed to ſtand good, yet there being a general Truſt raiſed in it to pay the Legacies in the Will, my Lord of *Bath* was no more than a Truſtee, and the Duke continued Maſter of the Eſtate, and he who had ſuch a general Power to charge the Land, might do it to the full Value, and then conſequently might diſpoſe of the Land too.

Now this Point of Truſt is the proper Subject of a Court of Equity; but to expound a Deed which is made on purpoſe to prevent a Deſcent upon the Heir, and then to make a general reſulting Truſt to let the Heir in, is ſuch a Conſtruction as will apparently contradict it ſelf and the Deed.

But that will fall out to be a Point that comes to be conſidered hereafter, how far this may be a Truſt in my Lord of *Bath* to anſwer Legacies or Debts in caſe the Perſonal Eſtate ſhould fall ſhort, it is not properly conſiderable now.

The only Point that was ſpoken to by the Counſel, and left for the Judgment of the Court was this, whether in this Caſe here were ſufficient Matter for a Court of Equity to interpoſe ſo far as to ſet aſide or impeach this Deed of 81.

Now as to that Matter, I think I have the Concurrence of my Lords the Judges in it; and I am of Opinion, that there doth not appear ſufficient Ground upon this Caſe for a Court of Equity to do any ſuch thing. Therefore I declare my Judgment;

That as far as my Lord *Mountague*, and my Lady Dutcheſs and Mr. *Monk* their Bills pray that the Court will interpoſe to ſet aſide this Deed; ſo far their Bills ought to diſmiſs'd.

As to any other Matters that ariſe in the Caſe, I ſuppoſe there will be time taken to ſpeak to them; but this is the only Matter in Judgment before us at preſent.

FINIS.